DOCKET

EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 110485

CASE NBR 84-1-07002 CSY CASE STATUS: DECIDED
SHORT TITLE Del Vecchio, George W. DOCKETED: Jun 27 1985
VERSUS Illinois
*** CAPITAL CASE -- Stay granted by lower court ***

Entry	Date	Note	Proceedings and Orders
1	May 16 1985		Application for extension of time to file petition and order granting same until June 27, 1985 (Stevens, May 21, 1985).
2	Jun 27 1985	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Jul 22 1985		Order extending time to file response to petition until August 26, 1985.
6	Aug 19 1985		Brief of respondent Illinois in opposition filed.
7	Aug 22 1985		DISTRIBUTED. September 30, 1985
8	Sep 23 1985	X	Reply brief of petitioner George W. Del Vecchio filed.
10	Oct 7 1985		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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No. 84 7002

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GEORGE W. DEL VECCHIO, Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

A.

Whether a death sentence can stand where the prosecutor argued to the jury that unless the petitioner is executed he will be released at the discretion of "experts" who could be easily fooled, who had paroled him once and were therefore responsible for the instant offense, and who would be willing to release him in "a few years", where under the law applicable to the case the petitioner would never have been eligible for discretionary parole.

B.

Whether this Court should grant certiorari to resolve a question which it has never considered: whether, in a death penalty hearing, the trial court may refuse a hearing on the defendant's motion to suppress as involuntary statements made in a different case, where the prosecution uses the statements as aggravating evidence and the issue of their voluntariness has never been litigated.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GEORGE W. DEL VECCHIO, Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE ILLINOIS SUPREME COURT

The petitioner, George W. Del Vecchio, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered on February 22, 1985.

I.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 105 Ill.2d 414, 86 Ill.Dec. 461, 475 N.E.2d 840. A copy of the opinion is attached hereto as Appendix A.

II.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on February 22, 1985. On March 29, 1985, the Supreme Court of Illinois denied a petition for rehearing in an order, a memorandum of which is appended hereto as Appendix B. On May 21, 1985, this Court granted an extension of time until June 27, 1985, to file a petition for issuance of a writ of certiorari. On May 31, 1985, the Illinois Supreme Court denied a motion to reconsider its opinion in an order, a memorandum of which is appended hereto as Appendix C. The jurisdiction of this Court is invoked under 28 USC §1257(3).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V.

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

STATEMENT OF THE CASE

On January 3, 1978, George Del Vecchio was indicted for murder, rape, deviate sexual assault, and burglary. (R. 3048-3053) Mr. Del Vecchio was convicted in a jury trial on November 19, 1979, and on November 30, 1979, was sentenced by the jury to death. (R. 2024, 3014)

A. Inaccurate Arguments Concerning Discretionary Parole

The first issue in this petition concerns whether, where under the applicable state law the defendant will never be eligible for discretionary parole, the prosecutor may argue to the jury that failure to impose a death sentence will result in the defendant being paroled at the discretion of "experts" who could be easily fooled, who had released the defendant once, and who would be willing to release him again in a few years. Mr. Del Vecchio raised the federal issue involved in this argument by filing a motion in limine and by objecting during the arguments. (R. 2929, 2958-2959) On appeal to the Illinois Supreme Court, Mr. Del Vecchio contended that such arguments were improper because they were inaccurate and misleading and because they injected irrelevant, speculative matters into the jury's consideration. In its opinion, the Illinois Supreme Court upheld the prosecutor's argument on the basis of California v. Ramos, 463 U.S. 992 (1983). 475 N.E.2d at 851. (See Appendix A-8-9)

The facts relating to the first issue are as follows:

Mr. Del Vecchio was found eligible for the death penalty based upon the statutory aggravating factors that the homicide occurred in the course of another felony (Ill.Rev.Stat., 1979, Ch. 38, §9-1(b)(6)) and that he had pleaded guilty in 1965 to a charge of murder. Ill.Rev.Stat., 1979, Ch. 38, §9-1(b)(3). (R. 3224, 3229-3230) Mr. Del Vecchio was paroled on this charge in April, 1973, after serving more than eight years imprisonment. (R. 2291, 2351)

Under Illinois law, Mr. Del Vecchio was entitled to elect whether he would be sentenced under the law in effect at the time

of the offense, which provided for the possibility of discretionary parole, or under the law in effect at the time of sentencing, which did not permit parole. Mr. Del Vecchio elected to be sentenced under the latter act. (R. 2933-2936)

In the opening stages of closing argument, the prosecutor argued that a death sentence should be imposed because unless he was executed, Mr. Del Vecchio would be eligible to be released at the discretion of the "experts" who had paroled him after serving eight years on his prior sentence:

> Eight years, eight years after he kills Mr. Christiansen [sic] and does these other acts, they decide to let him go, he's allowed to walk out, to be put on parole because he's rehabilitated. He's not going to do it any more. He's got the guards down there and Bible students in his corner back then.
>
> (R. 2948)
>
> He's already had the break of a lifetime, ladies and gentlemen. Mr. Christiansen [sic], 66-year old man. He spent eight years for that, eight years on an honor farm or parts of it on an honor farm. Eight years for Mr. Christiansen's [sic] entire life. Mr. Christiansen [sic] doesn't get any family visits anymore like George Delvecchio got when he was on that honor farm.
>
> You have a right, ladies and gentlemen, to protect yourself from people like George Delvecchio. You should demand that you be protected from people like George Delvecchio.
>
> You must, you can't leave it up to the experts. You can't trust the experts. People like George Delvecchio --
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: He may argue.
>
> -- can fool the experts. He's a manipulator, he's a malingerer, he fools other people, he uses other people.
>
> Don't put the decision on somebody else, because you can't count on them, because you can bet a few years from now there will be another expert who will be willing to come along and say he's fine.
>
> [DEFENSE COUNSEL]: Objection to this.
>
> THE COURT: He may argue.
>
> (R. 2958-2959)

During the closing portion of his argument, the prosecutor argued that responsibility for this offense rested with those who had paroled Mr. Del Vecchio before:

> ...Mrs. Christiansen [sic] in 1965 lost her husband, and for that life she got the short end of the stick. Mrs. Christiansen [sic] got shortchanged by the criminal justice system in Illinois, because for that life, for that precious life, eight years was the penalty he paid for that, but now the Canzoneri family has had to suffer from that.
>
> (R. 2997)

B. Denial of Voluntariness Hearing on 1965 Confessions

The second issue in this petition concerns the trial court's refusal to hold a hearing on petitioner's motion to suppress statements used at the death penalty hearing as aggravating evidence. Mr. Del Vecchio raised the federal issue involved in this argument by filing a motion to suppress his post-arrest statements of February 2, 1965, because those statements had been obtained involuntarily, in violation of the Fifth and Fourteenth Amendments. (R. 3214-3216) The pertinent facts to this issue are as follows:

As aggravating evidence to support its argument that Mr. Del Vecchio should be sentenced to death, the State introduced statements which Mr. Del Vecchio had made on February 2, 1965. (R. 2107-2145) Mr. Del Vecchio had pleaded guilty to charges of robbery, attempt robbery, and murder in the incidents to which the statements referred. (R. 2163-2171) Despite requests by defense counsel (R. 2051, 3216), the trial court refused a hearing on Mr. Del Vecchio's motion to suppress the statements as involuntary. (R. 2051, 2185)

Over defense objection, the 1965 statements were introduced into evidence, and amounted to confessions that Mr. Delvecchio was the triggerman in the three offenses to which he had pleaded guilty. (R. 2103-2112, 2117-2145) In closing argument, the prosecutor urged the jury to impose a death sentence because Mr. Del Vecchio's 1965 confessions indicated that he was a career criminal who did not deserve to live. (R. 2940, 2944-2947)

On appeal to the Supreme Court of Illinois, Mr. Del Vecchio contended that denying a hearing on the voluntariness of the statements violated his constitutional right to due process. The Illinois court held that Mr. Del Vecchio's 1965 plea to the underlying charges waived any Fifth Amendment objection to use of his confessions in a separate death penalty hearing. 475 N.E.2d at 849 (see Appendix A to this petition, A-7).

On March 29, 1985, the Illinois Supreme Court denied rehearing. On May 31 1985, the Illinois Supreme Court denied a petition to reconsider its opinion in light of subsequent opinions by that court.

V.

REASONS FOR GRANTING CERTIORARI

A.

A DEATH SENTENCE CANNOT STAND WHERE THE PROSECUTOR ARGUED TO THE JURY THAT UNLESS THE PETITIONER IS EXECUTED HE WILL BE RELEASED AT THE DISCRETION OF "EXPERTS" WHO COULD BE EASILY FOOLED, WHO HAD PAROLED HIM ONCE AND WERE THEREFORE RESPONSIBLE FOR THE INSTANT OFFENSE, AND WHO WOULD BE WILLING TO RELEASE HIM IN "A FEW YEARS", WHERE UNDER THE LAW APPLICABLE TO THE CASE THE PETITIONER WOULD NEVER HAVE BEEN ELIGIBLE FOR DISCRETIONARY PAROLE.

This case presents an issue analogous to Caldwell v. Mississippi, ___ U.S. ___ (No. 83-6607, June 11, 1985). In Caldwell, five members of this Court held that the Eighth Amendment is violated where the prosecutor gives to the jury inaccurate, misleading information concerning post-sentencing procedures. (Slip opinion, pp. 13-14; concurring opinion of Justice O'Conner, pp. 1-2) In this case, the prosecutor made false representations to the jury by arguing that unless Mr. Del Vecchio was executed, his return to society would be determined by "experts" who had paroled him on an earlier conviction and were therefore responsible for this offense, who could be easily fooled, and who in a few years would be willing to release him once again. These arguments were false because under the law applicable to this case, Mr. Del Vecchio would never be eligible for discretionary parole. Because the prosecutor's argument was inaccurate and created an intolerable danger that the decision to impose a death penalty would be based on emotion, arbitrariness, or caprice, this Court should grant certiorari, vacate the sentence, and remand the cause for a new sentencing hearing.

This offense occurred prior to February 1, 1978, when the Sentencing Act of 1977 took effect in Illinois. Prior to that date, Illinois law provided for an indeterminate sentencing scheme under which discretionary parole was permitted. Whether a prisoner was released at his first parole eligibility date, or was recommitted for another parole hearing, was left to the discretion of the Parole and Pardon Board. Ill.Rev.Stat., 19[illegible], Ch. 38, §§1003-3-2, 1003-3-3, and 1003-3-5. (See Appendix D for the text of the relevant 1977 statutes.)

Under the Sentencing Act of 1977, Illinois switched to a determinate sentencing scheme under which discretionary parole was abolished. Under this scheme, the sentence for murder could be death, life imprisonment, or a definite term between twenty and eighty years. Ill.Rev.Stat., 1978 Supp., Ch. 38, §§9-1, 1005-8-1 and 1005-8-2. Under the 1977 act, a person serving a determinate sentence is required to serve that entire sentence, minus good time credit awarded at a statutorily-mandated rate. Ill.Rev.Stat., 1978 Supp., Ch. 38, §1003-6-3. Therefore, under the new sentencing act, there is no discretionary parole or release.

The Sentencing Act of 1977 provided for an election by individuals whose offenses occurred prior to February 1, 1978, but who were sentenced after that date:

> ...If the defendant [whose violation occurred prior to February 1, 1978] has not been sentenced before the effective date of this amendatory Act of 1977, he shall have the right to elect to be sentenced under the law as it existed at the time of his offense or under the law in effect on and after the effective of this amendatory Act of 1977....
>
> Ill.Rev.Stat., 1978 Supp., Ch. 38, §1008-2-4(b).

The Illinois Supreme Court upheld the election provision in People v. Grant, 71 Ill.2d 551, 17 Ill.Dec. 814, 377 N.E.2d 4, 9 (1978).

Mr. Del Vecchio was entitled to such an election, as his offense occurred on December 23, 1977, and his sentencing occurred November 21, 1979. Before closing arguments were made at the sentencing hearing, Mr. Del Vecchio elected to be sentenced under the new act. (R. 2933-2936)

Thus, the law applicable to Mr. Del Vecchio's case provided that the possible sentences were death, life imprisonment, or a determinate term of between twenty and eighty years. If the latter sentence was imposed, Mr. Del Vecchio would be required to serve the entire term less any good time credit accumulated at the statutorily-mandated rate.

During closing argument, however, the prosecutor insisted that the jury could not trust the "experts" who had paroled Mr.

Del Vecchio once before,[1] and should impose a death sentence to insure that such experts would not release him again:

> Eight years, eight years after he kills Mr. Christiansen [sic] and does those other acts, they decide to let him go, he's allowed to walk out, to be put on parole because he's rehabilitated. He's not going to do it any more. He's got the guards down there and Bible students in his corner back then. ...
>
> (R. 2948)
>
> He's already had the break of a lifetime, ladies and gentlemen. Mr. Christiansen [sic], 66-year old man. He spent eight years for that, eight years on an honor farm or parts of it on an honor farm. Eight years for Mr. Christensen's entire life. Mr. Christiansen [sic] doesn't get any family visits anymore like George Delvecchio got when he was on that honor farm.
>
> You have a right, ladies and gentlemen, to protect yourself from people like George Delvecchio. You should demand that you be protected from people like George Delvecchio.
>
> You must, you can't leave it up to the experts. You can't trust the experts. People like George Delvecchio --
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> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: He may argue.
>
> [PROSECUTOR]: -- can fool the experts. He's a manipulator, he's a malingerer, he fools other people, he uses other people. Don't put the decision on somebody else, because you can't count on them, because you can bet a few years from now there will be another expert who will be willing to come along and say he's fine.
>
> [DEFENSE COUNSEL]: Judge, objection to this.
>
> THE COURT: He may argue.
>
> (R. 2958-2959)

During the closing portion of its argument, the prosecutor argued that those who had paroled Mr. Del Vecchio in 1973 were responsible for the instant offense:

---

[1] In 1965, when he was sixteen years old, Mr. Del Vecchio pleaded guilty to robbery, attempt robbery, and murder, and was committed to the Illinois Youth Commission. In accordance with Illinois law, after reaching age twenty-one he was resentenced to a term of fourteen to twenty-two years. He was paroled in 1973, after serving more than eight years imprisonment. The prior convictions were introduced at the sentencing hearing as aggravating evidence.

> ...Mrs. Christiansen [sic] in 1965 lost her husband, and for that life she got the short end of the stick. Mrs. Christiansen [sic] got short changed by the criminal justice system in Illinois, because for that life, for that precious life, eight years was the penalty he paid for that, but now the Canzoneri family has had to suffer from that.
>
> (R. 2997)[2]

This Court has repeatedly held that the Eighth Amendment requires a greater degree of scrutiny of capital sentencing procedures than is required in other criminal cases. Caldwell v. Mississippi, ___ U.S. ___, (Slip opinion at p. 7); California v. Ramos, 463 U.S. 992 at 998-999 (1983). In Caldwell, this Court noted that the procedures resulting in a death sentence must facilitate the "responsible and reliable exercise of sentencing discretion." (Slip opinion at p. 7); see also Lockett v. Ohio,

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[2] The closing arguments must also be considered in the context the prosecutor's opening argument, in which he stated that "so-called experts" had paroled Mr. Del Vecchio once before and were therefore responsible for this offense, and that a death sentence was the only way to prevent Mr. Del Vecchio from being paroled again:

> The so-called experts who are in charge of the criminal justice system decided that Mr. Christensen's life was worth fourteen to twenty years. That's the sentence that George Delvecchio received for the murder of Mr. Christensen. Well, you can see that if George Delvecchio from 1965 had served even the minimum of that sentence, fourteen years, Tony Canzoneri would be alive today and looking forward to Thanksgiving tomorrow. The so-called experts have said, let George Delvecchio out after serving eight years in custody, various juvenile facilities and then the Illinois State Penitentiary. They decided George Delvecchio had been rehabilitated. Those decisions from those so-called experts cost Tony Canzoneri his life.
>
> (R. 2065)
>
> There is only one way, ladies and gentlemen, from preventing [sic] that horrible mistake that was made in 1973 [the date of parole] from happening again and it's not anything of your doing that will be imposing the death penalty on George Delvecchio.
>
> (R. 2067)

Prior to closing arguments, the defense asked that the prosecutor be barred from arguing that the "experts" had made a mistake by paroling Mr. Del Vecchio in 1973. (R. 2929)

438 U.S. 586, 604 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Similarly, in Gardner v. Florida, 430 U.S. 349 (1977), this Court stated that it is vital both to the defendant and to society "that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." 430 U.S. at 358 (plurality opinion).

In Caldwell v. Mississippi, this Court held that giving the jury inaccurate and misleading information concerning post-sentencing procedures violates the Eighth Amendment because such information creates an unacceptable risk that a death sentence will be imposed arbitrarily or capriciously, or through whim or mistake. (Slip opinion, concurring opinion of Justice O'Conner, pp. 1-3)[3] In Caldwell, this Court noted that a jury which believed that it was not responsible for its determination might impose a death sentence for reasons other than because it believed death to be an appropriate sentence. (Slip opinion, pp. 8-11) A similar danger is present in this case: the jury might well have imposed a death sentence, although it did not believe such a sentence appropriate, because it was afraid that the same authorities who paroled Mr. Del Vecchio once might do so again.[4]

Arguments that the defendant will be paroled unless he is executed also create a substantial risk that the decision to impose death will be based on emotion and unsupportable speculation rather than upon factors which are relevant to determining the sentence. For that reason, most courts which have considered

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[3] In Caldwell, four members of this Court held that information on post-sentencing procedures is irrelevant to the sentencing process, whether accurate or not. Marks v. United States, 430 U.S. 188, 193 (1977) holds that where no single rationale explaining the result reached by this Court is shared by five Justices, the holding should be viewed as the position taken by the Justices who concurred in the judgment on the narrowest grounds. In Caldwell, the concurring opinion of Justice O'Conner represents that holding.

[4] See People v. Morse, 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33 (1964) [arguments concerning the possibility of parole risk that the jury will impose the death penalty to avoid any possibility that the defendant will ever be released. 388 P.2d 41.]

this issue have condemned such arguments in death cases.[5] For example, in Poole v. State, 453 A.2d 1218 (Md. 1983), the court held that such arguments are likely to cause the jury to disregard its duty to balance the aggravating and mitigating factors, and to impose a sentence based upon improper speculation. 453 A.2d at 1232-1233.[6]

Where inaccurate post-sentencing information is argued to the jury, the decision to impose a death sentence does not meet the standard of reliability required by the Eighth Amendment unless it can be said that such arguments had no effect on the jury. Caldwell v. Mississippi, slip opinion at p. 19. Although the Illinois Supreme Court appears to have made a finding of harmless error, it did not apply the Caldwell standard. Instead, its opinion suggests that there must be some affirmative showing that the jury relied on the possibility of parole, such as a note from the jury requesting more information. 475 N.E.2d at 851. (See A-9)

In the instant case, the Caldwell standard cannot be met, as there was substantial mitigating evidence which might well have convinced the jury that death was not an appropriate sentence. There was considerable evidence that Mr. Del Vecchio's criminal record was the result of his lifelong mental and emotional problems, which were caused by a childhood of physical and emotional abuse. As a child, Mr. Del Vecchio was shuttled between the home of his grandparents, one of whom brutalized him because of ethnic resentment, and the home of his mother, who

5 It is ironic that less than two months after approving the arguments in this case, the Illinois Supreme Court expressly refused to adhere to the rationale of California v. Ramos and held, as a matter of state law, that arguments concerning the possibility of parole, whether accurate or not, introduce an unacceptable danger that a death sentence will be based on emotion or improper speculation. People v. Brisbon, 106 Ill.2d 342, 365-368, ___ N.E.2d ___ (April 19, 1985).

6 See also Tucker v. Francis, 723 F.2d 1504 (CA11, 1984); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982); State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979); Commonwealth v. Aljoe, 420 Pa. 198, 216 A.2d 50 (1966); Eaton v. State, 177 So.2d 444 (Ala. 1965).

brought for separate stepfathers into Mr. Del Vecchio's early life. Two of Mr. Del Vecchio's first three stepfathers beat and cruelly abused him in his formative years. In addition, Mr. Del Vecchio's grandmother often vented her resentment toward his mother by attacking the mother, both physically and verbally, in George's presence, and by telling him that his mother did not love him. There was expert testimony that the trauma of Mr. Del Vecchio's childhood led to emotional maladjustments, heavy drug use, and eventually to criminal activity. While these crimes cannot be excused, they must be evaluated in light of Mr. Del Vecchio's past and in view of his considerable rehabilitative potential, as documented by the extensive testimony concerning his conversion to Christianity, his efforts to help others, his attempts to be a good stepfather, and his struggle to become regularly employed.

Because there was substantial mitigating evidence, it cannot be established that the prosecutor's inaccurate argument[7] concerning the possibility of parole had no effect on the jury's decision to impose a death sentence. Therefore, this Court should grant certiorari, vacate the death sentence, and remand the cause for a new sentencing hearing.

7 The holding of the Illinois Supreme Court that the prosecutor's remarks "accurately described the jury's sentencing choices" simply cannot be sustained on this record. (475 N.E.2d at 851, see A-9) While the prosecutor's remarks might have been accurate had Mr. Del Vecchio not already elected to be sentenced under the new act, after that election there was no possibility that he would ever be eligible for discretionary parole.

B.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A QUESTION WHICH IT HAS NEVER CONSIDERED: WHETHER, IN A DEATH PENALTY HEARING, THE TRIAL COURT MAY REFUSE A HEARING ON THE DEFENDANT'S MOTION TO SUPPRESS AS INVOLUNTARY STATEMENTS MADE IN A DIFFERENT CASE, WHERE THE PROSECUTION USES THE STATEMFNTS AS AGGRAVATING EVIDENCE AND THE ISSUE OF THEIR VOLUNTARINESS HAS NEVER BEEN LITIGATED.

As aggravating evidence at the death penalty hearing, the State introduced Mr. Del Vecchio's confessions concerning offenses to which he had pleaded guilty fourteen years earlier. Mr. Del Vecchio filed a motion to suppress those confessions as involuntary, but the trial court refused to hold a hearing. The State introduced the confessions as nonstatutory aggravation, and in closing argument specifically argued that the confessions established justification for a death sentence. Because a guilty plea should not be construed as surrendering constitutional objections to the use of evidence years later in a separate proceeding, this Court should grant certiorari, vacate the sentence, and remand the cause for resentencing.

In 1965, when he was sixteen years old, the petitioner pleaded guilty to charges of robbery, attempt robbery, and murder. He was committed to the Illinois Youth Commission, and after reaching the age of twenty-one was sentenced to serve a term of fourteen to twenty-two years. At the death penalty hearing in this case, the State used the prior offenses both to establish the statutory aggravating factor that petitioner had been convicted of a prior murder (Ill.Rev.Stat., 1979, Ch. 38, §9-1(b)(3)), and as nonstatutory aggravation justifying a death sentence. In addition, the State introduced Mr. Del Vecchio's confessions concerning the 1965 offenses as additional nonstatutory aggravation.

In response to the State's expressed intent to use the 1965 statements as aggravating evidence, Mr. Del Vecchio filed a motion to suppress the statements. The motion alleged that the statements were involuntary under the Fifth and Fourteenth Amendments because they had been induced by physical and psychological coercion. (R. 3214-3216) Despite requests by defense

counsel (R. 2051, 3216), the trial court refused to conduct a hearing on the motion to suppress. (R. 2051)

Two separate confessions were introduced. Officer Motzny testified that Mr. Del Vecchio gave a statement admitting his part in the offenses, and the statement was read to the jury. (R. 2114-2126) In that statement, Mr. Del Vecchio admitted shooting at people in a store and firing eleven shots at Fred Christensen during a robbery. The latter incident was the basis for the 1965 plea to murder, and the statement contained extensive details of the offense, including that Mr. Christensen was kicked in the head and brutalized. (R. 2118-2124) Mr. Del Vecchio also stated that he stole ammunition from his grandfather's drawer (R. 2123), and that he had been involved in an automobile theft. (R. 2121)

The State also introduced a second statement made by Mr. Del Vecchio at 11:50 p.m. on February 2, 1965, to an Assistant State's Attorney for Cook County. During this statement, Mr. Del Vecchio repeated much of the earlier statement, and gave additional details concerning the offenses. (R. 2125-2145)

In his direct appeal to the Illinois Supreme Court, Mr. Del Vecchio argued that precedents of this Court required the trial court to hold a hearing on his motion, and that use of the statements without such a hearing was prejudicial error. However, the Illinois court held that the 1965 guilty plea waived any subsequent constitutional challenge to any use of the statements:

> While defendant contests the voluntariness of his inculpatory statement, he does not contend that the guilty plea was involuntarily entered. This court has held that "a constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional." People v. Brown (1969), 41 Ill.2d 503, 505, 244 N.E.2d 159. Thus, the issue was waived by the voluntary plea of guilty.
>
> 475 N.E.2d at 849 (See Appendix A-7).

The above quotation is the entire holding of the Illinois Supreme Court on this issue. The court did not discuss Mr. Del Vecchio's contention that the general rule does not apply where

the statement is being used in a separate proceeding from that in which the guilty plea was entered.

While this Court has not considered the precise issue presented here, the principles which it enunciated in Haring v. Prosise, 462 U.S. 306 (1983) demonstrate that the Illinois court's holding was erroneous. In Haring, the defendant pleaded guilty in a state court to manufacturing a controlled substance. He then brought a civil rights action under 42 USC §1983 for civil damages against police officers who had conducted unlawful searches which produced the evidence leading to his prosecution. The district court granted summary judgment for the police officers on the ground that the guilty plea waived any Fourth Amendment claims for all subsequent proceedings. The Court of Appeals for the Fourth Circuit reversed, and this Court granted certiorari.

This Court held that a guilty plea waives only trial rights, not constitutional challenges to the evidence. However, such challenges are rendered irrelevant, for the purposes of the proceeding in which the plea was entered, by the defendant's agreement to allow his conviction to rest on his voluntary admission of guilt rather than upon any improperly obtained evidence. Quoting Menna v. New York, 423 U.S. 61, 62-63, this Court explained:

> [W]aiver was not the basic ingredient of this line of cases. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.
>
> 462 U.S. at 321 (emphasis in original).

Therefore, while a defendant who pleads guilty waives certain procedural rights at trial, he does not surrender constitutional challenges to the evidence. Instead, that evidence is merely rendered irrelevant to the criminal conviction. Because

the evidence is not relevant, questions about its constitutionality are also irrelevant, at least for purposes of the underlying conviction. Where the evidence becomes relevant for another purpose, as when Haring sought civil damages, the constitutional issues may be litigated. In this case, the confessions became relevant when the State sought to introduce them at the death penalty hearing. Therefore, Mr. Del Vecchio was entitled to have his constitutional objections heard.

Certiorari should also be granted because, as provided by Supreme Court Rule 17.1(b), the Illinois Supreme Court has decided the federal question in this case in conflict with the decisions, on analogous issues, of several circuit courts of appeal. In U.S. v. Magnuson, 680 F.2d 56, 58 (8th Cir. 1982) and U.S. v. Johnson, 634 F.2d 385, 386 (8th Cir. 1980), the Eighth Circuit held that a guilty plea waives constitutional issues only in the case in which the guilty plea was entered. In People v. Moore, 682 F.2d 853, 856 (9th Cir. 1982), the Ninth Circuit held that a plea of guilty waives Fifth Amendment rights only with regard to the crime which is being admitted, not as to other crimes for which the witness could be prosecuted. Finally, in Watts v. Graves, 720 F.2d 1416, 1422 (5th Cir. 1983), the Fifth Circuit interpreted Haring v. Prosise as precluding a rule that a plea of guilty waives constitutional rights in collateral proceedings.

Because the 1965 guilty plea did not waive Mr. Del Vecchio's Fifth Amendment challenge to his statements, the trial court erred by refusing to hold a voluntariness hearing. This Court has established beyond question that a criminal defendant who objects to the use of his statement is entitled to a fair and reliable determination of that statement's voluntariness. Jackson v. Denno, 378 U.S. 368, 376-377 (1964). This Court has also stated that "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law 'even if there is ample evidence aside from the confession to support the conviction.'" Mincey v. Arizona, 437 U.S. 385, 398 (1978) (emphasis in original). Because the trial court permitted Mr.

Del Vecchio's confessions to be introduced against him without ruling on the motion to suppress, due process was violated.

It is imperative that a death penalty not be imposed in reliance on involuntary confessions. This Court has recently reiterated that the Eighth Amendment requires greater scrutiny of the capital sentencing process than of non-capital cases, and that procedures resulting in a death sentence must facilitate a reliable and responsible exercise of sentencing discretion. See Caldwell v. Mississippi, ___ U.S. ___ (No. 83-6607, June 11, 1985) (slip op. p. 7). Admission of Mr. Del Vecchio's 1965 confessions were particularly prejudicial in this case, because the prosecutor specifically argued to the jury that matters contained in those confessions indicated that a death sentence should be imposed. (R. 2944-2946) In addition, Mr. Del Vecchio was prejudiced because the inculpatory statements of nontestifying co-defendants was held admissible on the basis that those statements "interlocked" with the improperly admitted confessions. 475 N.E.2d at 852 (see A-10) Had Mr. Del Vecchio's statements been suppressed, the statements of the co-defendants could not have been admitted. The status of the case would have been much different, because although there would have been evidence that Mr. Del Vecchio had pleaded guilty to certain charges in 1965, there would have been no evidence that he had been the triggerman, that he had been involved in other crimes, or that the crimes involved brutality. In addition, the prosecutor would have had no basis to argue that the circumstances of the 1965 crimes indicated that Mr. Del Vecchio should have been executed.

Use of an involuntary statement in a criminal proceeding has long been held by this Court to be prejudicial error, regardless of the weight of the other evidence. In this case, the trial court refused to hold a voluntariness hearing on statements which were used as aggravating evidence at a death penalty hearing. Because Mr. Del Vecchio was entitled to a hearing on his motion to suppress his statements as involuntary, this Court should grant certiorari, vacate the death sentence, and remand the cause for resentencing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

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COUNSEL FOR PETITIONER

The PEOPLE of the State of Illinois, Appellee,
v.
George W. DEL VECCHIO, Appellant.

No. 52800.

Supreme Court of Illinois.

Feb. 22, 1985.

Rehearing Denied March 29, 1985.

Defendant was convicted in the Circuit Court, Cook County, Louis B. Garippo, J., of murder, rape, deviate sexual assault, burglary, and was sentenced to death, and he appealed. The Supreme Court, Goldenhersh, J., held that: (1) defendant was not denied effective assistance of counsel; (2) defendant was not prejudiced by comments and argument of prosecution; (3) defendant was not entitled to excusal of veniremen after they overheard prospective juror, who had read about and discussed case, state in response to question on voir dire that defendant should not be out walking the streets, nor was he entitled to mistrial, where trial court excused all prospective jurors who had previously responded that they had knowledge of case through pretrial publicity and where remaining veniremen who heard juror's comment had not otherwise heard about case; (4) defendant was not prejudiced by introduction of evidence, or use of argument, referring to fact that victim of prior murder perpetrated by defendant was survived by spouse and child; (5) admission of certain testimony by psychiatrist called by prosecution at sentencing hearing was not improper; and (6) imposition of death penalty was proper.

Judgment affirmed.

Simon, J., filed opinion concurring in part and dissenting in part.

1. Criminal Law ⇐641.13(2)

Fact that defense counsel, after indicating prior to trial that defense would be insanity and after trial court stated that until evidence of insanity was presented it could not determine whether it would allow People to rebut insanity defense with evidence of defendant's prior convictions, did not make offer of proof, and subsequently withdrew insanity defense and proceeded on intoxication theory did not deprive defendant of effective assistance of counsel. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐1171.1(4)

Prosecutor's reference, during examination of witness in murder trial, to defense attorneys as "people who represent murderers" did not prejudice defendant, where defendant had not denied that he committed homicide and where crucial question was whether defendant's intoxication rendered him unable to form intent necessary to commit murder.

3. Criminal Law ⇐1171.1(3)

Prosecutor's comments, during closing argument in murder trial, that jury had heard "many different defenses," with defenses shifting first to one and then back to the other, and comment that insanity defense had been withdrawn "because it wasn't working," did not prejudice defendant, in light of fact that defendant had not denied that he committed homicide and that crucial question at trial concerned whether defendant's intoxication rendered him unable to form intent necessary to commit offense.

4. Criminal Law ⇐769, 1144.10

Character and scope of argument to jury is left very largely to trial court, and every reasonable presumption must be indulged that trial judge performed his duty and properly exercised discretion vested in him.

5. Criminal Law ⇐1169.11

Permitting the prosecution to introduce testimony; elicited during cross-examination of defendant's wife, that defendant had committed adultery with woman who was living in home with defendant and his wife was not reversible error, where defendant did not deny commission of offenses and only issue involving defendant's credibility was whether he was intoxicated at time of homicide.

6. Criminal Law ⇐1171.6

Prosecutor's comment, during argument in trial of defendant for murder, rape, deviate sexual assault, and burglary, to effect that defendant, his wife, and another woman had been in bed together did not result in reversible error, where defendant did not deny commission of offenses and only issue involving defendant's credibility was whether he was intoxicated at time of homicide.

7. Jury ⇐99(1)

Although jurors must be fair and impartial, it is not necessary that they be totally ignorant of facts of case before they assume their roles as jurors.

8. Jury ⇐116, 149

Defendant was not entitled to excusal of veniremen after they overheard prospective juror, who had read about and discussed case, state in response to question on voir dire that defendant should not be out walking the streets, nor was he entitled to mistrial, where trial court excused all prospective jurors who had previously responded that they had knowledge of case through pretrial publicity and where remaining veniremen who heard juror's comment had not otherwise heard about case.

9. Jury ⇐33(2.1)

Exclusion of veniremen opposed to death penalty, in accordance with principals of *Witherspoon*, did not deny defendant jury drawn from fair cross section of community.

10. Criminal Law ⇐1131(5)

With regard to prospective juror's responses to questions during voir dire, circuit court is in superior position to ascertain meaning that venireman intends to convey.

11. Jury ⇐108

Excusal for cause of prospective juror who stated, in response to trial court's question concerning whether juror would consider signing verdict affixing punishment of death, that he did not think that he had the right to do that, was proper.

12. Criminal Law ⇐986.6(2)

Defendant who was convicted of murder and subject to possible imposition of death penalty was not entitled to bifurcated sentencing procedure whereby in one hearing jury would receive evidence of statutory aggravating factors, and in another hearing jury would receive evidence of mitigation and nonstatutory aggravating factors, where evidence of nonstatutory aggravating factors could not have affected verdict of jury on the two statutory aggravating factors, consisting of conviction of two intentional or premeditated murders, and occurrence of murder during commission of another felony, concerning which evidence was overwhelming.

13. Criminal Law ⇐273.4(3)

Defendant's voluntary guilty plea to prior murder charge constituted waiver of defendant's right to challenge admission at sentencing hearing of evidence of his allegedly involuntary confession that preceded entry of guilty plea.

14. Criminal Law ⇐986.6(3)

In sentencing phase of prosecution for murder, trial court properly sustained prosecution's objection to nonresponsive answer made by defense witness who was asked, in attempt to elicit evidence of mitigation and to show potential of defendant for rehabilitation, how defendant had helped men who were in jail.

15. Criminal Law ⇐1012

Where defense failed to make offer of proof concerning evidence sought to be introduced, Supreme Court could not review defense challenge to trial court's action in sustaining prosecution's objection to testimony concerning defendant's alleged assistance of people in prison, introduced as evidence of mitigation in sentencing phase of murder trial.

16. Criminal Law ⇐986.2(4)

At death penalty hearing, any error in admission of testimony that victim of prior murder perpetrated by defendant was survived by spouse and child was harmless.

17. Criminal Law ⇐1171.1(6)

Prosecutor's comments, during closing argument of death penalty hearing, referring to fact that victim of prior murder perpetrated by defendant was survived by spouse and child and indicating that victim's widow was shortchanged by criminal justice system when defendant served only eight years for offense, did not constitute prejudicial error, where jury was fully aware of prior murder and circumstances surrounding it.

18. Criminal Law ⇐723(1)

Defendant was not denied fair trial by prosecutor's arguments at sentencing hearing referring to possibility of defendant's parole in event that jury chose not to impose death sentence.

19. Criminal Law ⇐1177

Defendant was not prejudiced by references made by psychiatrist called by prosecution at sentencing hearing to opinions of nontestifying experts, in light of statute suspending rules of evidence at sentencing hearings so that jury may have all relevant information before it. S.H.A. ch. 38, ¶ 9-1(e).

20. Criminal Law ⇐996(1.1)

Circuit court's conclusion that opinion of prosecution expert as to defendant's sanity at time of murder, introduced at sentencing hearing, was not materially affected by allegedly unreliable report of nontestifying psychologist was not erroneous, and therefore defendant was not entitled to new sentencing hearing.

21. Criminal Law ⇐986.2(1)

Prosecution could introduce testimony of psychiatric experts who had made court-

ordered examination of defendant, in order to rebut testimony by defense expert at sentencing hearing that at time of offense defendant was under extreme emotional distress, was unable to conform his conduct to requirements of law, and was suffering from "toxic psychosis," even though defense of insanity was withdrawn during guilt phase of trial. S.H.A. ch. 38, ¶ 115–6; U.S.C.A. Const.Amend. 5.

22. Criminal Law ⇐662.11

Admission at sentencing hearing of testimony of police officer concerning statements of defendant's accomplices implicating defendant in prior robbery and murder did not deny defendant right to confront witnesses, where defendant's confession to prior murder was not only consistent with, but was more detailed than, statements attributed to his accomplices. U.S.C.A. Const.Amend. 6.

23. Homicide ⇐311

Any error at sentencing hearing arising from fact that jury was not instructed that in order to find aggravating factor of "multiple murders occurring as result of unrelated acts," multiple murders must be premeditated, was cured by jury instruction to effect that in order to find such aggravating factor, prosecution would have to prove beyond reasonable doubt that defendant had been convicted of intentionally murdering each victim. S.H.A. ch. 38, ¶ 9–1(b), par. 3.

24. Criminal Law ⇐817

Defendant's argument concerning failure of verdict form to specify that finding of statutory aggravating factor of multiple murders required finding that murders were committed "intentionally" was waived by defendant's failure to object to form when tendered or to submit alternative form. S.H.A. ch. 38, ¶ 9–1(b), par. 3.

25. Criminal Law ⇐719(1), 722½

Prosecution's insinuations concerning defendant's misconduct and arguments outside evidence did not deny defendant fair sentencing hearing, in light of overwhelming evidence of his guilt.

26. Criminal Law ⇐730(5)

Any error in sentencing hearing arising from fact that prosecution argued that jury was to decide whether to impose death penalty by determining whether mitigating or aggravating evidence was greater was cured when circuit court sustained defendant's objections and admonished jurors that they would be correctly instructed on law, and when, prior to retiring for deliberations, jurors were correctly instructed by court regarding law to be applied in second phase of deliberations.

27. Homicide ⇐354

Death penalty was not excessive sentence for defendant convicted of murdering six-year-old boy, in light of defendant's serious criminal history, including prior murder and robbery, and his sole responsibility for crime.

28. Homicide ⇐311

Instruction at death penalty phase of murder trial to effect that neither sympathy nor prejudice should influence jury was not inappropriate. U.S.C.A. Const. Amends. 8, 14; IPI Criminal 2d 1.01.

29. Criminal Law ⇐1208.1(5)

Implicit in statutory scheme governing imposition of death penalty is that jury should carefully weigh aggravating and mitigating factors in order to reach fair and just result based on particular circumstances of offense and defendant. S.H.A. ch. 38, ¶ 9–1(c), par. 2; U.S.C.A. Const. Amends. 8, 14.

30. Courts ⇐107

Fact that United States Supreme Court denied certiorari in cases involving challenge to validity of death penalty statute did not require Supreme Court of Illinois to reconsider constitutionality of statute.

Neil Hartigan, Atty. Gen., Mark Rotert, Asst. Atty. Gen., Chicago, (Richard M. Daley, State's Atty., Cook County, Michael E. Shabat, Sara Dillery Hynes, Asst. State's Attys., Chicago, of counsel), for appellee.

Daniel D. Yuhas, Deputy State Appellate Defender, David P. Bergschneider, Asst. State Appellate Defender, Fourth Judicial Dist., Springfield, for appellant.

GOLDENHERSH, Justice:

In an indictment returned in the circuit court of Cook County, defendant, George W. Del Vecchio, was charged with murder (Ill.Rev.Stat.1975, ch. 38, par. 9–1(a)(2)), rape (Ill.Rev.Stat.1975, ch. 38, par. 11–1), deviate sexual assault (Ill.Rev.Stat.1975, ch. 38, par. 11–3), and burglary (Ill.Rev. Stat.1975, ch. 38, par. 19–1). Following a jury trial, defendant was found guilty of each of the charged offenses. In a hearing requested by the People, the jury found that there existed one or more of the factors set forth in section 9–1(d) of the Criminal Code of 1961 (Ill.Rev.Stat.1975, ch. 38, par. 9–1(b)) and that there were no mitigating factors sufficient to preclude a sentence of death. Defendant was sentenced to death, and the sentence was stayed (87 Ill.2d R. 609(a)) pending appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); 87 Ill.2d R. 603). The defendant was also sentenced to 15 years for rape, 6 years for deviate sexual assault, and 7 years for burglary.

At trial, Karen Canzoneri testified that she and her six-year-old son, Tony, occupied the first-floor and attic levels in a two-flat building in Chicago. On the evening of December 22, 1977, Mrs. Canzoneri, Tony, and Santo Falcone had driven to Lombard, where Mrs. Canzoneri purchased a stereo receiver. When they returned to Chicago they stopped at a tavern, and while there they saw defendant and his wife, Rose, both of whom they knew. When they left the tavern approximately a half hour later, Rose Del Vecchio came with them. After assembling the stereo which Mrs. Canzoneri had purchased, Falcone put Tony to bed downstairs. When Falcone returned upstairs, defendant was with him. Defendant brought with him a briefcase containing marijuana which he, Falcone, and Rose Del Vecchio smoked. After approximately an hour, Mrs. Canzoneri asked them to leave.

At about dawn, Mrs. Canzoneri was awakened when she heard footsteps. When she asked who was there, defendant identified himself, stating he "wanted to talk." Mrs. Canzoneri attempted to shoot defendant with a pistol which Falcone had given her, but defendant slapped it out of her hand. Defendant would not permit her to check on Tony, responding that Tony was sleeping peacefully. When she attempted to leave the room to check on her son, defendant pushed her back on the bed, kissed her face, breasts, vagina, and legs, and despite her request to stop, had intercourse with her. During the intercourse, she heard a telephone ring. She asked defendant to let her answer it because it was probably her mother, who lived across the street. She told him that unless she answered the telephone, her mother would come over. Defendant did not respond. Mrs. Canzoneri could not determine which of the three telephones in the apartment was ringing. The ringing stopped. The telephone rang again and defendant went downstairs. Mrs. Canzoneri looked for the telephone but could find only the cord. The telephone, severed from the cord, was found later when the police searched the premises. She ran downstairs and across the street to her mother's house. Mrs. Canzoneri told her mother she had been raped and called the police.

Chicago police officer William Sacco testified that five police officers responded to the call of a rape in progress. Mrs. Canzoneri told the officers that there was a man with a gun in her house, that she knew the man and that it was defendant. After searching the first floor, the officers went up to the attic bedroom. Alerted by the sound of snow crunching outside the window, Officer Sacco saw defendant crawling on the roof and ordered him inside. Defendant responded by blurting, "I didn't kill nobody." Defendant was arrested, given *Miranda* warnings, and handcuffed. Officer Richard Elmer testified that, after searching various areas of the building and interviewing a neighbor, he and other officers discovered a crawl space located under the stairs. They opened the door and found the body of Tony Canzoneri. Later examination showed that the boy's trachea, carotid artery, jugular vein and vagus nerve were completely severed, and the third and fourth cervical vertebrae were fractured.

It appears from the testimony that when she entered her home earlier that evening Mrs. Canzoneri left her purse on the kitchen table. Her purse, among other things, contained her keys, and a credit card. When defendant was taken into custody, the credit card was in his possession.

Defendant contends first that he did not receive effective assistance of counsel. The record shows that prior to trial defense counsel had indicated that the defense would be insanity. Counsel attempted to determine whether the circuit court would permit the People to rebut the insanity defense with evidence of defendant's 1965 convictions for murder, robbery and attempted robbery. The circuit court stated that until the evidence of insanity was presented it could not determine whether evidence of the prior convictions was relevant. Defendant contends that defense counsel should have made an offer of proof concerning the evidence which would be presented and that the failure to do so constituted ineffective assistance of counsel. Defendant argues that because of the failure to make an offer of proof counsel did not learn whether the circuit court would exclude evidence of the prior convictions and therefore were unable to make an informed tactical decision concerning the defense to be presented. Defendant contends that, as a result, counsel withdrew a meritorious insanity defense and instead relied on an intoxication defense for which the evidence did not present a *prima facie* case.

The People contend that defendant received excellent representation. They state that defense counsel interviewed 30 to 40 witnesses, filed numerous pretrial motions, obtained court-ordered psychiatric examinations of defendant, vigorously cross-examined the People's witnesses, and called 24 witnesses to testify on behalf of defendant.

The People further note that prior to the People's cross-examination of Dr. Stipes, who had testified concerning the effect of the ingestion of PCP, defense counsel, *in limine*, indicated they would tender an insanity instruction. The court offered defense counsel a choice of an insanity instruction, in which event the People would be permitted to rebut the defense with evidence of defendant's prior convictions, or forgoing an insanity instruction, thereby precluding introduction of evidence of the prior convictions. It was at this point, and for this reason, that defense counsel elected to withdraw the insanity defense and proceed on an intoxication theory.

In *People v. Albanese* (1984), 104 Ill.2d 504, 85 Ill.Dec. 441, 473 N.E.2d 1246, after reviewing the Supreme Court's recent opinion in *Strickland v. Washington* (1984), — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674, and this court's opinion in *People v. Greer* (1980), 79 Ill.2d 103, 37 Ill.Dec. 313, 402 N.E.2d 203, the court said:

"Although we do not foresee that application of the *Strickland* rule will produce results that vary significantly from those reached under *Greer*, we hereby adopt the Supreme Court rule for challenges to effectiveness of both retained and appointed counsel (see *People v. Royse* (1983), 99 Ill.2d 163, 170 [75 Ill. Dec. 658, 457 N.E.2d 1217]) and reject the single-component test of *Twomey*.

To assist lower courts, the Supreme Court also offered the following guidelines for applying its two-component standard: '[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' — U.S. —, —, 104 S.Ct. 2052, 2069–70, 80 L.Ed.2d 674, 699." 104 Ill.2d 504, 526–27, 85 Ill.Dec. 441, 473 N.E.2d 1246.

[1] On this record, we are unable to say that defendant was prejudiced by counsel's alleged ineffectiveness. Clearly, defendant's contention that the evidence presented with respect to the intoxication defense failed to establish a *prima facie* case is without merit because an instruction was given on the intoxication defense and the jury chose to reject it. Obviously the jury also rejected the evidence of defendant's insanity adduced at the sentencing hearing because it failed to find the existence of the mitigating factor that "defendant was under the influence of extreme mental or emotional disturbance" (Ill.Rev.Stat.1977, ch. 38, par. 9–1(c)(2)). Thus, we are unable to say that counsel's performance caused substantial prejudice to the defendant without which the result of the trial would probably have been different.

[2, 3] Defendant contends next that he was denied a fair trial because of the assistant State's Attorneys' personal attacks on defense counsel and their improper argument that the defense was a fraud. In the cross-examination of a police officer, defense counsel attempted to show that the officer had refused to discuss the case with one of defendant's attorneys. On redirect examination the assistant State's Attorney asked the officer if it was "his practice to talk to defense attorneys, people who represent murderers?" In closing argument the assistant State's Attorney asserted that the jury had heard "many different defenses," with the defenses shifting first to one and then back to the other. Comment was made to the effect that the insanity defense had been withdrawn "because it wasn't working." In several instances objections were sustained, and in one instance a motion for mistrial was denied.

It would have been better if the comments of which defendant complains had not been made, but on this record we conclude that the comments did not result in prejudice which requires reversal. Defendant has not denied that he committed the homicide, and the context in which the improper argument was made is unlikely to have influenced the jury in deciding the crucial question whether defendant's intoxication from the ingestion of PCP rendered him unable to form the intent necessary to commit the offense.

[4] As the court said in *People v. Smothers* (1973), 55 Ill.2d 172, 302 N.E.2d 324:

"The character and scope of argument to the jury is left very largely to the trial court, and every reasonable presumption must be indulged in that the trial judge has performed his duty and properly exercised the discretion vested in him. (*North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 486 [29 N.E. 899].) The general atmosphere of the trial is observed by the trial court, and cannot be reproduced in the record on appeal. The trial court is, therefore, in a better position than a reviewing court to determine the prejudicial effect, if any, of a remark made during argument, and unless clearly an abuse of discretion, its ruling should be upheld." (55 Ill.2d 172, 176, 302 N.E.2d 324.)

We find no such abuse of discretion here.

Defendant contends next that the circuit court committed reversible error in permitting the People to introduce irrelevant testimony that defendant had committed adultery and to argue, without any basis in the evidence, that defendant and his wife engaged in deviate sexual activity. The testimony to which this contention refers was elicited during the cross-examination of defendant's wife, Rose Del Vecchio, who stated that Mary Blackstone had lived in their home and that during that period she had slept with defendant. The reference to improper prosecutorial comment concerns a remark to the effect that defendant, his wife, and another woman were in bed together. This comment was in turn based on an attempt to elicit from Mrs. Del Vecchio the admission that there had been a lesbian relationship between the witness and Ms. Blackstone.

[5, 6] In the context of the entire record it is difficult to see that the relationship of either defendant or his wife with Ms. Blackstone was material to the issues in the case, but an argument can be made that in view of the wide-ranging direct testimony of Mrs. Del Vecchio the cross-examination concerning defendant's adultery with Ms. Blackstone may have been proper. In our opinion, however, neither question warrants lengthy analysis or discussion. Defendant's evidence shows that he was an admitted narcotics dealer, a regular user of PCP, and on the night of the occurrence in question, he asserts that he was so completely intoxicated by reason of the ingestion of PCP that he has no recollection of what occurred. In view of those circumstances we conclude that evidence of his adultery with Ms. Blackstone or the possibility that the jury may have concluded there was a lesbian relationship between defendant's wife and Ms. Blackstone would have had no prejudicial effect on the jury. This was not a situation where defendant denied the commission of the offenses; the only issue involving defendant's credibility was whether he was intoxicated at the time of the homicide. Under the circumstances we hold that if any error was committed, it was, beyond a reasonable doubt, harmless.

[7, 8] Defendant contends next that the circuit court erred in refusing to grant a mistrial or to excuse veniremen who overheard a juror state her personal opinion of the accused. Defendant contends that the circuit court should have interrogated the remaining veniremen concerning the effect of the remark. Upon commencement of *voir dire*, the court instructed the prospective jurors that defendant was presumed innocent, that this presumption would be overcome only by proof of guilt beyond a reasonable doubt, and that they were to base their decision solely on the evidence presented at trial. The court then posed several questions to the prospective jurors collectively, regarding whether any had discussed the case. The court instructed them to answer by standing. If a prospective juror stood he would then be examined individually by the court. Following that questioning period, jurors were called to the jury box 12 at a time and examined individually in panels of four. One of the prospective jurors said she had read about and discussed the case. When asked whether she had reached an opinion of defendant's guilt, she responded, "I think the guy shouldn't be out walking the streets." The court then excused all five prospective jurors who had previously responded that they had knowledge of the case through pretrial publicity.

While our system of jurisprudence requires the participation of fair and impartial jurors, it is not necessary that they be totally ignorant of the facts of the case before they assume their roles as jurors. (*Irvin v. Dowd* (1961), 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 756.) The court excused those who had responded that they had previous knowledge of the case. The remaining veniremen who heard the comment had not otherwise heard about the case. We are unable to say that because of this single, isolated comment the jurors were unable to reach a verdict based solely on the evidence.

[9] Defendant has also argued that the systematic exclusion of veniremen opposed to the death penalty denied him his right to a jury drawn from a fair cross-section of the community and resulted in a jury biased toward the prosecution. We have considered and rejected this latter contention that qualifying a jury according to the principles of *Witherspoon v. Illinois* (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, results in a jury biased in favor of conviction (*People v. Lewis* (1981), 88 Ill.2d 129, 147, 58 Ill.Dec. 895, 430 N.E.2d 1346, *cert. denied* (1982), 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308) and decline to reconsider it here. Implicit in that holding was our conclusion that a jury chosen in accordance with the principles of *Witherspoon* does not deny defendant a jury drawn from a fair cross-section of the community.

[10, 11] We consider next defendant's contention that his sentence must be vacated because it was imposed by a jury which was selected in violation of the principles established in *Witherspoon v. Illinois* (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. In *Witherspoon*, the Supreme Court held that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the

death penalty or expressed conscientious or religious scruples against its infliction. The court said:

"Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." (391 U.S. 510, 516, n. 9, 88 S.Ct. 1770, 1774, n. 9, 20 L.Ed.2d 776, 781–82, n. 9.

Defendant contends that one juror was improperly excused during *voir dire* in violation of the standard set forth in *Witherspoon*. The following colloquy, in pertinent part, occurred:

"THE COURT: * * * Now, with respect to—I asked some questions with respect to the juror's views on the death penalty.

Is there anyone here who feels that—who feels that after you—if you sat on a jury that found a defendant guilty of murder, is there anyone here who feels that he or she would automatically set the penalty at death after a—after a finding of guilty of murder?

(No responses.)

THE COURT: Okay, yes, sir.

PROSPECTIVE JUROR RADEK: Russell Radek, 397. You know, I thought about it last night, you know, about the statement, and the death penalty, and I just don't think I—that I could do that.

* * * * * *

THE COURT: Is your feeling such that no matter what the circumstances, no matter what the background of the defendant is, is your feeling such that you consider a set of facts under which you would consider signing—consider signing a verdict affixing the punishment of death?

PROSPECTIVE JUROR RADEK: I don't think I have that right to do that."

Defendant argues that "at no time did Mr. Radek make it unmistakably clear that he would vote against the death penalty regardless of the evidence." The circuit court is in a superior position to ascertain the meaning a venireman intends to convey. In our opinion the standards of *Witherspoon* were met and the prospective juror's inclusion of "I think" did not render his answers ambiguous. We are persuaded that regardless of what the evidence showed, he would have voted against the imposition of the death penalty, and we conclude that the circuit court did not err in excusing him.

Defendant contends next that the circuit court erred in holding a single hearing at which the jury heard evidence of statutory aggravating factors along with evidence of mitigation and nonstatutory aggravating factors. Defendant contends that this resulted in prejudice requiring reversal. He points out that with reference to the statutory aggravating factors the People's burden of proof is beyond a reasonable doubt, and the rules of evidence apply; whereas on the question whether the mitigating factors are sufficient to preclude a death sentence, information is admissible without regard to the rules of evidence, and the statute specifies no burden of proof. Defendant argues that evidence of defendant's prior convictions for armed robbery and attempted armed robbery, which were introduced as evidence of nonstatutory aggravating factors, were irrelevant to the question of the statutory aggravating factors.

[12] While we do not exclude the possibility that a factual situation might arise which would require a hearing bifurcated in the manner for which defendant contends, we are of the opinion that no such bifurcation was required here, and that defendant was not prejudiced. The two statutory aggravating factors alleged were that the defendant had been convicted of two intentional or premeditated murders, and that the murder of Tony Canzoneri occurred in the course of the commission of another felony. We fail to perceive in what manner the evidence of nonstatutory aggravating matters could have affected the verdict of the jury on these two questions. The testimony shows that, in the 1965 murder of which defendant was convicted, he fired several shots at the deceased while he lay helpless on the sidewalk. With respect to the other aggravating factor, the evidence is overwhelming of defendant's guilt of rape and deviate sexual assault. On the record before us we conclude that defendant's contentions are without merit.

[13] Defendant contends next that the circuit court erred in admitting evidence at the sentencing hearing of his allegedly involuntary confession and subsequent guilty plea to the 1965 murder of Fred Christiansen without first conducting a hearing on his motion to suppress the confession on voluntariness grounds. While defendant contests the voluntariness of his inculpatory statement, he does not contend that the guilty plea was involuntarily entered. This court has held that "a constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional." (*People v. Brown* (1969), 41 Ill.2d 503, 505, 244 N.E.2d 159.) Thus, the issue was waived by the voluntary plea of guilty.

[14, 15] Defendant next contends that the circuit court improperly sustained the People's objections to evidence which would have shown the manner in which defendant had helped other persons. Defendant argues that the evidence was relevant to mitigation and to show his potential for rehabilitation. The first ruling of which defendant complains occurred during the following exchange between defense counsel and defendant's half-sister, Laura Rosiles:

"MR. QUEENEY [defense counsel]: In what ways would he help those men in jail?

LAURA ROSILES [half-sister]: Well, I talked to Howie. From what I understand he was suffering—

MR. THEOBALD [assistant State's Attorney]: Objection.

THE COURT: Sustained."

The defense also presented testimony of Marilyn Berg that defendant had helped her oldest son in his problems with the police, and had talked to her about her husband's problems. The second allegedly erroneous ruling occurred during the following colloquy:

"MR. QUEENEY [defense counsel]: Did George ever talk to you about your husband?

A: Yes, he did.

Q: What kind of problems does your husband have?

MR. OBBISH [prosecuting attorney]: Objection, Judge.

THE COURT: Objection sustained."

As the People point out, defense counsel was at no time precluded from eliciting testimony regarding the help defendant offered to these men. In the first instance, the circuit court properly sustained an objection to the witness' nonresponsive answer. In the second instance, it correctly sustained the objection to defense counsel's irrelevant questions regarding the nature of Mrs. Berg's husband's problems. There was no offer of proof concerning the evidence sought to be introduced, and absent such offer we are unable to review the matter.

[16] Defendant contends next that the People improperly introduced irrelevant and prejudicial evidence that Fred Christiansen, the 1965 murder victim, was survived by a spouse and a child. At the death penalty hearing, during the assistant State's Attorney's interrogation of a Chicago police officer, the following ensued:

"Q: And while you were at the Belmont Hospital, did you have occasion to see Helen and Geraldine Christiansen?

A: Yes, I did.

Q: And did they make an identification of their husband and their father at the Belmont Hospital?

A: Yes, they did."

The People respond that this testimony was relevant for the purpose of showing the victim's identity. Defendant contends that it cannot be argued that this testimony was offered for the purpose of identification because the victim had already been identified by Officer Cavanaugh, who had appeared at the scene and who testified that he knew Christiansen. There was no further interrogation on the matter, and we conclude that the error, if any, was harmless.

[17] The next reference to the victim's family to which defendant objects occurred during closing argument, when the assistant State's Attorney commented:

"Mrs. Christiansen in 1965 lost her husband, and for that life she got the short end of the stick. Mrs. Christiansen got shortchanged by the criminal justice system in Illinois, because for that life, for that precious life, eight years was the penalty that he paid for that, and not only did Mrs. Christiansen suffer from that, but now the Canzoneri family has had to suffer from that."

Citing *People v. Bernette* (1964), 30 Ill.2d 359, 197 N.E.2d 436, defendant argues that, despite the fact that defense counsel did not object, the reference to the victims is prejudicial error requiring reversal. In *Bernette* the court held that the evidence relating to the victim's family had no relevance to guilt or innocence. What occurred here, both in the testimony and in argument, is clearly distinguishable from *Bernette*. In *Bernette* the People elicited detailed testimony concerning the deceased's surviving family and commented on it in argument. Moreover, although remarks regarding a deceased's family are generally improper, we have held that where, as here, the comments occurred during the sentencing hearing, the ordinary rules controlling the admissibility of evidence do not apply. (*People v. Davis* (1983), 95 Ill.2d 1, 37, 69 Ill.Dec. 136, 447 N.E.2d 353.) In *Davis*, the defendant's death sentence was upheld despite similar comments. (See also *People v. Free* (1983), 94 Ill.2d 378, 69 Ill.Dec. 1, 447 N.E.2d 218, *cert. denied* (1983), — U.S. —, 104 S.Ct. 200, 78 L.Ed.2d 175.) Furthermore, the jury was fully aware of the prior murder and the circumstances surrounding it, and we doubt that its verdict was influenced by the argument.

[18] We consider next defendant's argument that certain comments made by the People during both opening and closing arguments improperly referred to the possibility of defendant's parole in the event the jury chose not to impose the death sentence. During opening argument, the assistant State's Attorney argued:

"The so-called experts who are in charge of the criminal justice system decided that Mr. Christiansen's life was worth fourteen to twenty years. That's the sentence that George Del Vecchio received for the murder of Mr. Christiansen. Well, you can see that if George

Del Vecchio from 1965 had served even the minimum of that sentence, fourteen years, Tony Canzoneri would be alive today and looking forward to Thanksgiving tomorrow. The so-called experts have said, let George Del Vecchio out after serving eight years in custody, various juvenile facilities and then the Illinois State Penitentiary. They decided George Del Vecchio had been rehabilitated. Those decisions from those so-called experts cost Tony Canzoneri his life."

During closing arguments, he argued:

"You have a right, ladies and gentlemen, to protect yourself from people like George Del Vecchio. You should demand that you be protected from people like George Del Vecchio.

You must, you can't leave it up to the experts. You can't trust the experts. People like George Del Vecchio—

MR. QUEENEY: Objection.

THE COURT: He may argue.

MR. OBBISH:—can fool the experts. He's a manipulator, he's a malingerer, he fools other people, he uses other people.

Don't put the decision on somebody else, because you can't count on them, because you can bet a few years from now there will be another expert who will be willing to come along and say he's fine."

Citing *People v. Walker* (1982), 91 Ill.2d 502, 64 Ill.Dec. 531, 440 N.E.2d 83, defendant contends that because these comments were made during the sentencing hearing he is entitled to a new sentencing hearing. In *Walker* the court noted that the possibility of parole was a factor in at least one juror's mind because the circuit judge had received a note from the jury asking for clarification of the possibility of parole. We find *Walker* distinguishable in that there is no evidence that the possibility of parole was a factor considered in the jury's deliberations. Further, the assistant State's Attorney accurately described the jury's sentencing choices. As the Supreme Court said, "[s]urely the [defendant] cannot argue that the [United States] Constitution prohibits the State from accurately characterizing its sentencing choices." (*California v. Ramos* (1983), 463 U.S. 992, ——, n. 19, 103 S.Ct. 3446, 3455, n. 19, 77 L.Ed.2d 1171, 1183, n. 19.) The assistant State's Attorney was attempting to "inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death." (463 U.S. 992, ——, n. 23, 103 S.Ct. 3446, 3457, n. 23, 77 L.Ed.2d 1171, 1186, n. 23.) We cannot say, in the circumstances shown here, defendant was denied a fair trial. *People v. Williams* (1983), 97 Ill.2d 252, 305–06, 73 Ill. Dec. 360, 454 N.E.2d 220.

[19] Defendant contends next that psychiatrists, called by the People at the sentencing hearing, were improperly allowed to testify as to the opinions of nontestifying experts. Dr. Richard Rogers, a clinical psychologist, and Dr. James Cavanaugh, a psychiatrist called by the People in rebuttal, testified that, in their opinions, defendant was sane at the time of the offenses, was a sociopath and malingerer who at the time of the offense was not suffering from extreme mental or emotional distress. The testimony of which defendant complains consists of statements that other psychiatrists who had examined defendant reached conclusions consistent with those of Drs. Rogers and Cavanaugh. Citing *People v. Ward* (1975), 61 Ill.2d 559, 338 N.E.2d 171, and *Wilson v. Clark* (1981), 84 Ill.2d 186, 49 Ill.Dec. 308, 417 N.E.2d 1322, defendant argues that in permitting these experts to testify concerning the opinions of nontestifying witnesses, the circuit court, in violation of defendant's sixth amendment right of confrontation, erroneously permitted the jury to consider the opinions of the nontestifying psychiatrists. He argues that although under *Ward* and *Wilson* an expert may state an opinion based on the report of another witness it was error to permit him to state the opinion of the other witness. The evidence was admitted at the sentencing hearing pursuant to section 9–1(e) (Ill. Rev.Stat.1977, ch. 38, par. 9–1(e)), which provided:

"During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing."

This court has held that this section suspends the rules of evidence so that the jury may have all relevant information before it. (*People v. Free* (1983), 94 Ill.2d 378, 422, 69 Ill.Dec. 1, 447 N.E.2d 218, *cert. denied* (1983), — U.S. ——, 104 S.Ct. 200, 78 L.Ed.2d 175.) Moreover, we are not persuaded that the brief reference to the fact that the opinions of other nontestifying experts were consistent with those experts who testified was prejudicial.

[20] Defendant's next contention also concerns the testimony of Dr. James Cavanaugh. Dr. Cavanaugh testified that defendant was sane at the time of the offense, not under "extreme emotional distress," and diagnosed defendant as possessing an antisocial personality disorder and being a malingerer. It is defendant's contention that he is entitled to a new sentencing hearing because the circuit court denied him the opportunity to make an offer of proof that Dr. Cavanaugh relied on the report of an unqualified, unlicensed psychologist in forming his own opinion on defendant's mental condition at the time of the offenses. The record shows that defense counsel sought to examine Dr. Cavanaugh outside the presence of the jury to determine the extent of his reliance on the report. The circuit court denied defense counsel's request and concluded from a review of the doctor's report and Dr. Cavanaugh's direct testimony that the report of the psychologist did not materially affect Dr. Cavanaugh's opinion. The People argue that the issue has been resolved because this court in *People v. Free* (1983), 94 Ill.2d 378, 69 Ill.Dec. 1, 447 N.E.2d 218, *cert. denied* (1983), — U.S. ——, 104 S.Ct. 200, 78 L.Ed.2d 175, found that Dr. Ronald K. Siegel, the psychologist involved, is qualified. (94 Ill.2d 378, 411.) The circuit court concluded that Dr. Cavanaugh's opinion was not materially affected by Dr. Siegel's allegedly unreliable report. On this record we are unable to say that the circuit court erred in its conclusion.

Defendant contends next that he must be granted a new sentencing hearing because the circuit court, in violation of the statute and defendant's fifth amendment rights, improperly admitted the testimony of psychiatrists who had made a court-ordered examination of defendant. Defendant argues that under the provisions of section 115–6 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat.1977, ch. 38, par. 115–6) the testimony was inadmissible unless he sought to raise the defense of insanity and points out that the defense of insanity was withdrawn during the guilt phase of the trial.

[21] In the sentencing hearing defendant called Dr. Edward Senay, who testified that in his opinion defendant was under extreme emotional distress, was unable to conform his conduct to the requirements of the law at the time of the offense, and was suffering from "toxic psychosis." It is the position of the People that the testimony of Drs. Cavanaugh and Rogers, who had examined defendant, was admissible, and as previously noted, they testified in rebuttal that defendant was not suffering from extreme emotional disturbance, was able to conform his conduct to the requirements of the law, was possessed of an antisocial personality disorder, and was a malingerer. We find no violation of defendant's constitutional rights and conclude that under the authority of *People v. Silagy* (1984), 101 Ill.2d 147, 174–75, 77 Ill.Dec. 792, 461 N.E.2d 415, the testimony of Drs. Cavanaugh and Rogers was properly admitted to rebut the testimony of Dr. Senay.

[22] Citing *Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, defendant contends next that at the sentencing hearing he was denied the right to confront witnesses when the circuit court erroneously permitted a police officer to testify concerning the statements of defendant's accomplices who had implicated defendant in the 1965 robbery and murder of Fred Christiansen. *Bruton* held that admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination guaranteed by the confrontation clause of the sixth amendment. This court has interpreted *Bruton* and its progeny not to require "'reversal of a defendant's conviction when the defendant himself has confessed and his confession "interlocks" with and supports the confession of his codefendant.'" (*People v. Davis* (1983), 97 Ill.2d 1, 21, 72 Ill.Dec. 272, 452 N.E.2d 525.) Defendant's confession is not only consistent with, but is more detailed than, the statements attributed to his codefendants. In these circumstances, the admission into evidence of the accomplices' statements concerning the 1965 murder did not constitute reversible error.

[23, 24] Defendant contends next that he must be granted a new sentencing hearing because the jury was not instructed that in order to support the finding that there existed the aggravating factor set forth in section 9–1(b)(3) (Ill.Rev.Stat.1977, ch. 38, par. 9–1(b)(3)), multiple murders occurring as a result of unrelated acts must be premeditated. Alternatively, he contends that he is entitled to a new sentencing hearing because the verdict form finding the existence of that aggravating factor did not state that the murders for which defendant had been convicted were intentional. Defendant's first argument was considered by this court in *People v. Davis* (1983), 95 Ill.2d 1, 69 Ill.Dec. 136, 447 N.E.2d 353, which held that section 9–1(b)(3) does not require premeditated acts, but merely "two or more murders resulting from intentional or knowing acts." (95 Ill.2d 1, 36, 69 Ill.Dec. 136, 447 N.E.2d 353.) Notwithstanding, the error, if any, was cured by the jury instruction which provided:

"Before the defendant who has attained the age of eighteen years can be eligible for the death penalty, either or both of the following statutory aggravating factors must be proven beyond a reasonable doubt.

One: * * *.

Two: The defendant George Del Vecchio has been convicted of intentionally murdering Anthony Canzoneri and intentionally murdering one Fred Christiansen."

Defendant's alternative argument that the verdict form omitted the word "intentionally" was waived by his failure to object to the form when tendered or to submit an alternative form.

Defendant contends next that the death penalty statute is unconstitutional because it permits the consideration of undefined nonstatutory aggravating factors and thus violates the eighth amendment ban on arbitrary and capricious imposition of the death penalty. In support of his argument defendant cites *Henry v. Wainwright* (5th Cir.1981), 661 F.2d 56, *vacated and remanded* (1982), 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326, *aff'd on remand* (5th Cir.1982), 686 F.2d 311, *vacated and remanded* (1983), — U.S. —, 103 S.Ct. 3566, 77 L.Ed.2d 1407, *affirmed in part and reversed in part on remand* (5th Cir. 1983), 721 F.2d 990, *cert. denied* (1984), — U.S. —, 104 S.Ct. 2374, 80 L.Ed.2d 846. In *People v. Free* (1983), 94 Ill.2d 378, 427, 69 Ill.Dec. 1, 447 N.E.2d 218, *cert. denied* (1983), — U.S. —, 104 S.Ct. 200, 78 L.Ed.2d 175, we distinguished the Florida statute considered in *Henry* and need not discuss it again.

[25] Defendant next contends that he was denied a fair sentencing hearing where the assistant State's Attorney made insinuations concerning defendant's misconduct and engaged in prejudicial argument not supported by the evidence. In support of his argument he cites *People v. Nuccio* (1969), 43 Ill.2d 375, 253 N.E.2d 353, in which the judgment was reversed and the cause remanded because the State's Attorney repeatedly insinuated that defendant had previously threatened decedent and some of the prosecution's witnesses, but failed to call those witnesses, some of whom were in the courtroom. We find it unnecessary to enumerate the instances where the assistant State's Attorney in the instant case made these alleged insinuations. The court in *Nuccio* limited its holding to "[w]here, as here, the guilt of the accused is not manifest, but is dependent upon the degree of credibility accorded by the trier of fact to his testimony and that of the witnesses who testify on his behalf * * *." (43 Ill.2d 375, 396, 253 N.E.2d 353.) Given the overwhelming evidence of guilt, we find *Nuccio* inapposite.

[26] Defendant contends next that the assistant State's Attorney improperly argued that the jury was to decide whether to impose the death penalty by determining whether the mitigating or aggravating evidence was greater. He argues that the admonition is contrary to the statute and misinformed the jury of its function. We find it unnecessary to set forth the specific remarks which defendant enumerates because we have determined that the effect of the improper argument, if any, was cured when the circuit court sustained defendant's objections and admonished the jurors that they would be correctly instructed on the law. Prior to retiring for deliberations, the jurors were correctly instructed by the court regarding the law to be applied in the second phase of deliberations. We conclude that the circuit court took proper steps to insure that the jury properly applied the law to the facts of this case.

We next consider defendant's contention that the People's being given the opportunity to both open and close the final arguments at the sentencing hearing denied him due process. In *People v. Williams* (1983), 97 Ill.2d 252, 302–03, 73 Ill.Dec. 360, 454 N.E.2d 220, we considered and rejected this contention, and we decline to reconsider it here.

[27] Defendant next argues that the death penalty is excessive and requests this court to reduce the sentence to a term of imprisonment. Citing *People v. Carlson* (1980), 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233, and *People v. Gleckler* (1980), 82 Ill.2d 145, 44 Ill.Dec. 483, 411 N.E.2d 849, defendant argues that this court is obliged to reduce his sentence because his crimes were caused by mental or emotional disturbance. However, both cases are inapposite. *Gleckler* vacated the death sentence which had been imposed on the defendant, one of three persons indicted for the murder, because "Gleckler, with no criminal history, * * * was not the ringleader in this sordid affair; nor [were] his rehabilitative prospects demonstrably poorer than those who received imprisonment terms." (82 Ill.2d 145, 171, 44 Ill.Dec. 483, 411 N.E.2d 849.) Likewise, in *Carlson*, the court considered as a mitigating factor, *inter alia*, the fact that defendant had no prior criminal background. Given defendant's prior serious criminal history (including murder and robbery) and his sole responsibility for the crime, we do not agree that imposition of the death penalty upon defendant was excessive.

Defendant raises a number of constitutional issues, all of which have been determined adversely to defendant's contentions. Defendant argues that the constitutional requirement of adequate appellate review mandates written, factual findings by the jury. This precise issue was considered in *People v. Gaines* (1981), 88 Ill.2d 342, 384, 58 Ill.Dec. 795, 430 N.E.2d 1046, *cert. denied* (1982), 456 U.S. 959, 72 L.Ed.2d 482, 102 S.Ct. 2034, and relying on *People v. Brownell* (1980), 79 Ill.2d 508, 38 Ill.Dec. 757, 404 N.E.2d 181, the court held

such findings were not required. Defendant also contends that article I, section 11, of the Illinois Constitution requires that the jury be instructed to consider whether he possessed any rehabilitative potential and because his attorney failed to tender such an instruction, his death sentence should be vacated. In *People v. Gaines* (1981), 88 Ill.2d 342, 380–83, 58 Ill.Dec. 795, 430 N.E.2d 1046, *cert. denied* (1982), 456 U.S. 1001, 102 S.Ct. 2285, 73 L.Ed.2d 1295, this issue was decided adversely to defendant. We have also considered and rejected the argument that the statutory mitigating factor of "extreme mental or emotional disturbance" (Ill.Rev.Stat.1977, ch. 38, par. 9-1(c)(2)) is both unconstitutionally vague and impermissibly limiting. (*People v. Silagy* (1984), 101 Ill.2d 147, 163–65, 77 Ill.Dec. 792, 461 N.E.2d 415.) Defendant has also argued that because the death penalty statute provides no data—gathering procedures for compilation of all capital felony cases, this court is unable to prevent its arbitrary imposition. We have previously considered and rejected this contention. (*People v. Brownell* (1980), 79 Ill.2d 508, 541–44, 38 Ill.Dec. 757, 404 N.E.2d 181.) In *Pulley v. Harris* (1984), — U.S. —, 104 S.Ct. 871, 79 L.Ed.2d 29, the Supreme Court imposed no requirement not met by our present method of review. Defendant contends that the failure of the death penalty statute to require the People to prove beyond a reasonable doubt the absence of mitigating factors sufficient to preclude the death penalty violates due process of law and the eighth amendment. In *People v. Free* (1983), 94 Ill.2d 378, 69 Ill.Dec. 1, 447 N.E.2d 218, *cert. denied* (1983), — U.S. —, 104 S.Ct. 200, 78 L.Ed.2d 175, we reaffirmed our holding in *People v. Brownell* (1980), 79 Ill.2d 508, 38 Ill.Dec. 757, 404 N.E.2d 181, that a unanimous jury, or the court, must weigh the mitigating factors against the aggravating factors and conclude that there are no mitigating factors sufficient to preclude the imposition of the death sentence. We decline the invitation to reconsider the propriety of those holdings.

[28] Defendant, in his supplemental brief, argues that, in violation of the eighth and fourteenth amendments, the circuit court improperly instructed the jury that "[n]either sympathy nor prejudice should influence you." The court gave instructions in the form of Illinois Pattern Jury Instructions (IPI) Criminal, No. 1.01 (2d ed. 1981) (general instructions regarding the functions of the court and the jury), omitting paragraph 4 as recommended by the Illinois Supreme Court Committee for capital cases. Defendant cites *People v. Easley* (1983), 34 Cal.3d 858, 671 P.2d 813, 196 Cal.Rptr. 309, which held that, although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase, it is necessary that the jury consider the sympathetic elements of defendant's background during the death penalty phase. (34 Cal.3d 858, 880, 671 P.2d 813, 827, 196 Cal.Rptr. 309, 323.) We are not persuaded that the instruction given was inappropriate and note further that no instruction consistent with defendant's contentions was tendered.

[29] Defendant contends next that the death penalty was imposed in violation of the eighth and fourteenth amendments to the Constitution of the United States. He argues that "the essence of the death penalty decisions of the Supreme Court has been that a constitutionally imposed death sentence requires an individualized sentencing process in which the sentencer will decide whether 'death is the appropriate punishment in a specific case.'" He argues, too, that the jurors, despite finding that mitigation did not outweigh aggravation, may have considered capital punishment inappropriate, but may have felt that they were without discretion to return a verdict other than one imposing the death penalty. He contends that for those reasons the jury, in addition to the finding that mitigation did not outweigh aggravation, should have been required to find that death was the appropriate punishment. He contends, too, that the jury may have assumed that it was defendant's burden to disprove the suitability of the death sentence. We do not agree. Implicit in the statutory scheme is that the jury should carefully weigh the factors "in order to reach a fair and just result, one that is based on the particular circumstances of the offense and the defendant." (*People v. Brownell* (1980), 79 Ill.2d 508, 538, 38 Ill. Dec. 757, 404 N.E.2d 181.) The holding in *Brownell* resolves any question of "appropriateness."

Defendant contends next that after being found eligible for the death sentence, in violation of the eighth and fourteenth amendments he bore the burden of proving that the death penalty was inappropriate. In *People v. Williams* (1983), 97 Ill.2d 252, 302, 73 Ill.Dec. 360, 454 N.E.2d 220, we held that at the aggravation and mitigation hearing there is no burden of proof, but, rather, the People have the burden of going forward with the evidence, and we decline to reconsider that holding here.

[30] Finally, defendant asserts that four of the members of this court have previously expressed the opinion that the statute is unconstitutional because it bestows upon the People the sole discretion to determine whether to seek the death penalty, and that this may result in arbitrary application of the statute. (See *People ex rel. Carey v. Cousins* (1979), 77 Ill.2d 531, 544, 34 Ill.Dec. 137, 397 N.E.2d 809 (Ryan, J., Goldenhersh, C.J., and Clark, J., dissenting); *People v. Lewis* (1981), 88 Ill.2d 129,

179, 58 Ill.Dec. 895, 430 N.E.2d 1346 (Simon, J., dissenting), *cert. denied* (1982), 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308.) Defendant notes that three of the judges filed concurring opinions, relying on *stare decisis*, upholding the constitutionality of the death penalty statute (see *People v. Lewis* (1981), 88 Ill.2d 129, 165 (Goldenhersh, C.J., concurring), 166 (Ryan, J., concurring), 167, 58 Ill.Dec. 895, 430 N.E.2d 1346 (Clark, J., concurring), *cert. denied* (1982), 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308), and that these opinions were predicated on the assumption that the Supreme Court would review the validity of the statute. The argument continues that because the Supreme Court has denied *certiorari*, this court is, in effect, the "final tribunal" to determine the statute's validity. Defendant argues that the Supreme Court's denial of *certiorari* in, *inter alia*, *People v. Lewis* (1981), 88 Ill.2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346, *cert. denied* (1982), 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308, requires this court to reconsider the constitutionality of the statute. We do not agree. However, we note parenthetically that there are decisions of this court on which petitions for writs of *certiorari* await consideration. (See *People v. Gacy* (1984), 103 Ill.2d 1, 82 Ill.Dec. 391, 468 N.E.2d 1171; *People v. Holman* (1984), 103 Ill.2d 133, 82 Ill.Dec. 585, 469 N.E.2d 119; *People v. Albanese* (1984), 104 Ill.2d 504, 85 Ill.Dec. 441, 473 N.E.2d 1246.) As the People note, previous denials of *certiorari* by the Supreme Court do not preclude it from later granting *certiorari*. (*Chessman v. Teets* (1957), 354 U.S. 156, 175–77, 77 S.Ct. 1127, 1137–38, 1 L.Ed.2d 1253, 1265–67.) In *People ex rel. Carey v. Cousins* (1979), 77 Ill.2d 531, 34 Ill.Dec. 137, 397 N.E.2d 809, *cert. denied* (1980), 445 U.S. 953, 100 S.Ct. 1603, 63 L.Ed.2d 788, the majority traced the history of the broad discretion enjoyed by the State's Attorney in both the initiation and the management of criminal litigation and determined that such discretion was not unconstitutional. *Cousins* has subsequently been reaffirmed (see, *e.g.*, *People v. Lewis* (1981), 88 Ill.2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346, *cert. denied* (1982), 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308), and we decline to reconsider it here.

For the reasons stated, we affirm the judgment of the circuit court of Cook County. The clerk of this court is directed to enter an order fixing Tuesday, September 17, 1985, as the date on which the sentence of death entered by the circuit court is to be executed. The defendant shall be executed by lethal injection in the manner provided by section 119–5 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat.1983, ch. 38, par. 119–5). A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections, to the warden of Stateville Correction Center, and to the warden of the institution wherein the defendant is confined.

Judgment affirmed.

SIMON, Justice:

I concur in the majority's judgment that the defendant's conviction for murder should be affirmed, but I dissent from the decision to impose the death penalty. For the reasons set forth in my separate opinions in *People v. Lewis* (1981), 88 Ill.2d 129, 179, 58 Ill.Dec. 895, 430 N.E.2d 1346 (Simon, J., dissenting), in *People v. Silagy* (1984), 101 Ill.2d 147, 184, 77 Ill.Dec. 792, 461 N.E.2d 415 (Simon, J., concurring in part and dissenting in part), and in *People v. Albanese* (1984), 104 Ill.2d 504, 549, 85 Ill.Dec. 441, 473 N.E.2d 1246 (Simon, J., concurring in part and dissenting in part), I have concluded that the Illinois death penalty statute violates the United States and Illinois constitutions.

Moreover, the comments made by the assistant State's Attorney during the sentencing hearing regarding the possibility of parole for the defendant if the jury chose not to impose the death penalty require that the death sentence be reversed. In *People v. Walker* (1982), 91 Ill.2d 502, 515, 64 Ill.Dec. 531, 440 N.E.2d 83, this court held:

> "Our statute requires that the court or jury, as the case may be, consider aggra- ; and mitigating factors, which are relevant to the imposition of the death penalty. (Ill.Rev.Stat.1977, ch. 38, par. 9–1(c).) Whether or not the defendant may, at some future time, be paroled is not a proper aggravating factor to consider in determining whether the death penalty should be imposed."

The majority's attempt to distinguish *Walker* from this case is unpersuasive. Here, as in *Walker*, the prosecution argued that the defendant might be paroled if he received a prison term. Here, as in *Walker*, the trial court overruled objections to this improper argument. Here, as in *Walker*, the jury may have considered the possibility of parole in determining whether the defendant should be executed, a factor that is not permitted by the Illinois death penalty statute.

As this court said in *Walker*, "[in] a death penalty case, a high standard of procedural accuracy is required in determining whether or not that penalty will be imposed. The procedural errors in this case do not conform to the high standard which must be followed to insure that proper matters are considered in aggravation and that the penalty is applied in as uniform a manner as possible within the framework of an adversary proceeding." 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83.

California v. Ramos (1983), 463 U.S. 992, —— n. 19, 103 S.Ct. 3446, 3454–55 n. 19, 77 L.Ed.2d 1171, 1183 n. 19, is not in point. The defendant has not argued here that the United States Constitution prohibits the State from accurately characterizing its sentencing choices. Rather, he has argued that our death penalty statute prohibits the State from raising improper issues in the determination of aggravating factors. Our opinion in *People v. Walker* supports that contention. I would therefore vacate the sentence of death and remand to the trial court for resentencing.

APPENDIX B

52800

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

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March 29, 1985

State Apellate Defender
300 E. Monroe, S#102
Springfield, IL 62701

L

No. 52800 - People State of Illinois, appellee, v. George Del Vecchio, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court, Circuit Court or other Agency on April 8, 1985.

APPENDIX C

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

May 31, 1985

State Appellate Defender
Fourth Judicial District
300 E. Monroe Street, Suite 102
Springfield, IL 62701

ATT'N: David P. Bergschneider

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 52800 - People State of Illinois, appellee, v. George Del Vecchio, appellant.

Motion by appellant for leave to file a petition for reconsideration of this court's opinion filed on February 22, 1985. Motion denied.

JH:sdl

cc: SA/Crim
AG/Crim
George W. Del Vecchio

APPENDIX D

Illinois Revised Statutes, 1977, Chapter 38:

1003-3-2. § 3-3-2. Powers and Duties.) (a) The Parole and Pardon Board shall:

(1) determine the time of release on parole of persons committed to the Department of Corrections eligible for such release;

(2) determine the conditions of parole, impose sanctions for violations of parole, and revoke parole; and

(3) determine the time of discharge from parole.

(b) The Parole and Pardon Board shall hear all requests for pardon, reprieve or commutation, and make recommendations without publicity to the Governor.

(c) The Parole and Pardon Board shall cooperate with the Department in promoting an effective system of parole.

(d) The Parole and Pardon Board shall promulgate rules for the conduct of its work, and the Chairman shall file a copy of such rules and any amendments thereto with the Director and with the Secretary of State.

(e) The Parole and Pardon Board shall keep records of all of its official actions and shall make them accessible in accordance with law and the rules of the Board.

(f) The Parole and Pardon Board or parolee who has allegedly violated his parole may require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under investigation or hearing. The Chairman of the Parole and Pardon Board may sign subpoenas which shall be served by any agent or public official authorized by the Chairman of the Illinois Parole and Pardon Board, or by any person lawfully authorized to serve a subpoena under the laws of the State of Illinois. The attendance of witnesses, and the production of documentary evidence, may be required from any place in the State to a hearing location within 150 miles of the place where the violation is alleged to have occurred, and before the Chairman of the Illinois Parole and Pardon Board or his designated agent or agents or any duly constituted Committee or Subcommittee of the Board. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the circuit courts of the State, and witnesses whose depositions are taken and the persons taking those depositions are each entitled to the same fees as are paid for like services in actions in the circuit courts of the State. Fees and mileage shall be vouchered for payment when the witness is discharged from further attendance.

In case of disobedience to a subpoena, the Board may petition any circuit court of the State for an order requiring the attendance and testimony of witnesses or the production of documentary evidence or both. A copy of such petition shall be served by personal service or by registered or certified mail upon the person who has failed to obey the subpoena, and such person shall be advised in writing that a hearing upon the petition will be requested in a court room to be designated in such notice before the judge hearing motions or extraordinary remedies at a specified time, on a specified date, not less than 10 nor more than 15 days after the deposit of the copy of the written notice and petition in the U. S. mails addressed to the person at his last known address or after the personal service of the copy of the notice and petition upon such person. The court upon the filing of such a petition, may order the person refusing to obey the subpoena to appear at an investigation or hearing, or to there produce documentary evidence, if so ordered, or to give evidence relative to the subject matter of that investigation or hearing. Any failure to obey such order of the circuit court may be punished by that court as a contempt of court.

Each member of the Board and any hearing officer designated by the Board shall have the power to administer oaths and to take the testimony of persons under oath.

(g) Except under Sections 3-3-5 and 3-3-9,[1] a majority of the members then appointed to the Parole and Pardon Board shall constitute a quorum for the transaction of all business of the Board.

(h) The Parole and Pardon Board shall annually transmit to the Director a detailed report of its work for the preceding calendar year. The annual report shall be transmitted by the Director to the Governor for submission to the Legislature.

1003-3-3. § 3-3-3. Parole Eligibility.) (a) Every person serving a term of imprisonment under Section 5-8-1[1] shall be eligible for parole when he has served:

(1) the minimum term of an indeterminate sentence less time credit for good behavior, or 20 years less time credit for good behavior, whichever is less; or

(2) 20 years of a life sentence less time credit for good behavior; or

(3) 20 years or one-third of a determinate sentence, whichever is less, less time credit for good behavior.

(b) Every person committed to the Juvenile Division under Section 5-10 of the Juvenile Court Act[2] or Section 5-8-6 of this Code[3] and confined in the State correctional institutions or facilities if such juvenile has not been tried as an adult shall be eligible for parole without regard to the length of time the person has been confined or whether the person has served any minimum term imposed. However, if a juvenile has been tried as an adult he shall only be eligible for parole as an adult under paragraph (a) of this Section.

(c) Any person in the custody of the Department of Corrections on the date this Section becomes operative who, under prior law, would have been eligible for parole sooner than provided in this Section, shall have his parole eligibility determined under such prior law; otherwise his eligibility shall be determined under this Article and Article 8 of Chapter V.[5]

1003-3-5. § 3-3-5. Hearing and Determination.) (a) The Parole and Pardon Board shall meet as often as need requires to consider persons for parole. It may meet and order its actions in panels of 3 or more members. The action of a majority of the panel shall be the action of the Board. In consideration of persons committed to the Juvenile Division, the panel shall have at least a majority of members experienced in juvenile matters.

(b) If the person under consideration for parole is in the custody of the Department, at least one member of the Board shall interview him, and a report of that interview shall be available for the Board's consideration. However, in the discretion of the Board, the interview need not be conducted if a psychiatric examination determines that the person could not meaningfully contribute to the Board's consideration. The Board may in its discretion parole a person who is then outside the jurisdiction on his record without an interview. The Board need not hold a hearing or interview a person who is paroled under paragraph (d) or (e) of this Section or released on mandatory release under Section 3-3-10.[1]

(c) The Board shall not parole a person eligible for parole if it determines that:

(1) there is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or

(3) his release would have a substantially adverse effect on institutional discipline.

(d) A person committed under the Juvenile Court Act[2] who has not been sooner released shall be paroled on or before his 20th birthday to begin serving a period of parole under Section 3-3-8.[3]

(e) A person who has served the maximum term of imprisonment imposed at the time of sentencing less time credit for good behavior shall be released on parole to serve a period of parole under Section 5-8-1.[4]

(f) The Board shall render its decision within a reasonable time after hearing and shall state the basis therefor both in the records of the Board and in written notice to the person on whose application it has acted. In its decision, the Board shall set the person's time for release, or if it denies parole it shall provide for a rehearing not more than 12 months from the date of denial, however, the Board, on its own motion, may provide for a rehearing for an individual more frequently than once every 12 months or less frequently than once every 12 months but no less frequently than once every 3 years. If the Board shall parole a person, and if he is not released within 90 days from the effective date of the order granting parole, the matter shall be returned to the Board for review.

APPENDIX E

Illinois Revised Statutes, 1978 Supp., Chapter 38:

1003-6-3. Rules and regulations for early release

§ 3-6-3. Rules and Regulations for Early Release. (a)(1) The Department of Corrections shall prescribe rules and regulations for the early release on account of good conduct of persons committed to the Department which shall be subject to review by the Prisoner Review Board.

(2) Such rules and regulations shall provide that the prisoner shall receive one day of good conduct credit for each day of service in prison for all classes of felonies other than where a sentence of "natural life" has been imposed. Each day of good conduct credit shall reduce by one day the inmate's period of incarceration set by the court.

(3) Such rules and regulations shall also provide that the Director may award up to 90 days additional good conduct credit for meritorious service in specific instances as the Director deems proper.

(b) Whenever a person is or has been committed under several convictions, with separate sentences, such sentences shall be construed under Section 5-8-4 [1] in granting and forfeiting of good time.

(c) The Department shall prescribe rules and regulations for revoking good conduct credit, or suspending or reducing the rate of accumulation thereof for specific rule violations, during imprisonment. Such rules and regulations shall provide that:

(1) good conduct credits previously earned shall accumulate on a monthly basis.

(2) no inmate may be penalized more than one year of good conduct credit for any one infraction.

When the Department seeks to revoke, suspend or reduce the rate of accumulation of any good conduct credits for an alleged infraction of its rules, it shall bring charges therefor against the prisoner sought to be so deprived of good conduct credits before the Prisoner Review Board as provided in subparagraph (a)(4) of Section 3-3-2 of this Code,[2] if the amount of credit at issue exceeds 30 days or when during any 12 month period, the cumulative amount of credit revoked exceeds 30 days. However, the Board shall not be empowered to review the Department's decision with respect to the loss of 30 days of good conduct credit within any calendar year for any prisoner or to increase any penalty beyond the length requested by the Department.

(3) The Director of the Department of Corrections, in appropriate cases, may restore up to 30 days good conduct credits which have been revoked, suspended or reduced. Any restoration of good conduct credits in excess of 30 days shall be subject to review by the Prisoner Review Board. However, the Board may not restore good conduct credit in excess of the amount requested by the Director.

(4) Nothing contained in this Section shall prohibit the Prisoner Review Board from ordering, pursuant to Section 3-3-9(a)(3)(i)(B) [3], that a prisoner serve up to one year of the sentence imposed by the court which was not served due to the accumulation of good conduct credit.

1005-8-1. Sentence of imprisonment for felony

§ 5-8-1. Sentence of Imprisonment for Felony. (a) A sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for murder, a term shall be not less than 20 years and not more than 40 years or, if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 [1] are present, the court may sentence the defendant to a term of natural life imprisonment;

(2) for a person adjudged a habitual criminal under Article 33B of the Criminal Code of 1961, as amended,[2] the sentence shall be a term of natural life imprisonment.

(3) for a Class X felony, the sentence shall be not less than 6 years and not more than 30 years;

(4) for a Class 1 felony, the sentence shall be not less than 4 years and not more than 15 years;

(5) for a Class 2 felony, the sentence shall be not less than 3 years and not more than 7 years;

(6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years;

(7) for a Class 4 felony, the sentence shall be not less than 1 year and not more than 3 years.

(b) The sentencing judge in each felony conviction shall set forth his reasons for imposing the particular sentence he enters in the case, as provided in Section 5-4-1 of this Code.[3] Those reasons may include any mitigating or aggravating factors specified in this Code, or the lack of any such circumstances, as well as any other such factors as the judge shall set forth on the record that are consistent with the purposes and principles of sentencing set out in this Code.

(c) The trial court may reduce or modify a sentence, but shall not increase the length thereof by order entered not later than 30 days from the date that sentence was imposed. This shall not enlarge the jurisdiction of the court for any other purpose.

(d) Except where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment. For those sentenced under the law in effect prior to this amendatory Act of 1977, such term shall be identified as a parole term. For those sentenced on or after such effective date, such term shall be identified as a mandatory supervised release term. Subject to earlier termination under Section 3-3-8,[4] the parole or mandatory supervised release term shall be as follows:

(1) for murder or a Class X felony, 3 years;

(2) for a Class 1 felony or a Class 2 felony, 2 years;

(3) for a Class 3 felony or a Class 4 felony, 1 year.

(e) A defendant who has a previous and unexpired sentence of imprisonment imposed by another state and who, after sentence for a crime in Illinois, must return to serve the unexpired prior sentence may have his sentence by the Illinois court ordered to be concurrent with the prior sentence in the other state. The court may order that any time served on the unexpired portion of the sentence in the other state, prior to his return to Illinois, shall be credited on his Illinois sentence. The other state shall be furnished with a copy of the order imposing sentence which shall provide that, when the offender is released from confinement of the other state, whether by parole or by termination of sentence, the offender shall be transferred by the Sheriff of the committing county to the Illinois Department of Corrections. The court shall cause the Department of Corrections to be notified of such sentence at the time of commitment and to be provided with copies of all records regarding the sentence.

Amended by P.A. 80-1099, § 3, eff. Feb. 1, 1978.

1005-8-2. Extended term

§ 5-8-2. Extended Term. (a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 [1] for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 [2] were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following:

(1) for murder, a term shall be not less than 40 years and not more than 80 years;

(2) for a Class X felony, a term shall be not less than 30 years and not more than 60 years;

(3) for a Class 1 felony, a term shall be not less than 15 years and not more than 30 years;

(4) for a Class 2 felony, a term shall be not less than 7 years and not more than 14 years;

(5) for a Class 3 felony, a term shall be not less than 5 years and not more than 10 years;

(6) for a Class 4 felony, a term shall be not less than 3 years and not more than 6 years.

(b) If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that a sentence under this Section was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice.

1005-2-4. Prosecutions continued—Applicable sentencing provisions

§ 8-2-4. Prosecutions Continued; Applicable Sentencing Provisions. (a) Prosecution for any violation of law occurring prior to January 1, 1973, is not affected or abated by the Unified Code of Corrections.[1] If the offense being prosecuted has not reached the sentencing stage or a final adjudication by January 1, 1973, then for purposes of sentencing the sentences under the Unified Code of Corrections apply if they are less than under the prior law upon which the prosecution was commenced.

(b) Prosecution for any violation of law occurring before the effective date of this amendatory Act of 1977 is not affected or abated by this amendatory Act of 1977. If the defendant has not been sentenced before the effective date of this amendatory Act of 1977, he shall have the right to elect to be sentenced under the law as it existed at the time of his offense or under the law in effect on and after the effective date of this amendatory Act of 1977. If a sentence has been imposed before the effective date of this amendatory Act of 1977, the defendant shall not have the right of election even though his case has not been finally adjudicated on appeal; however, where eligible, he shall have the rights provided by Section 3-3-2.1 of this Code.[2]

OPPOSITION BRIEF

EDITOR'S NOTE

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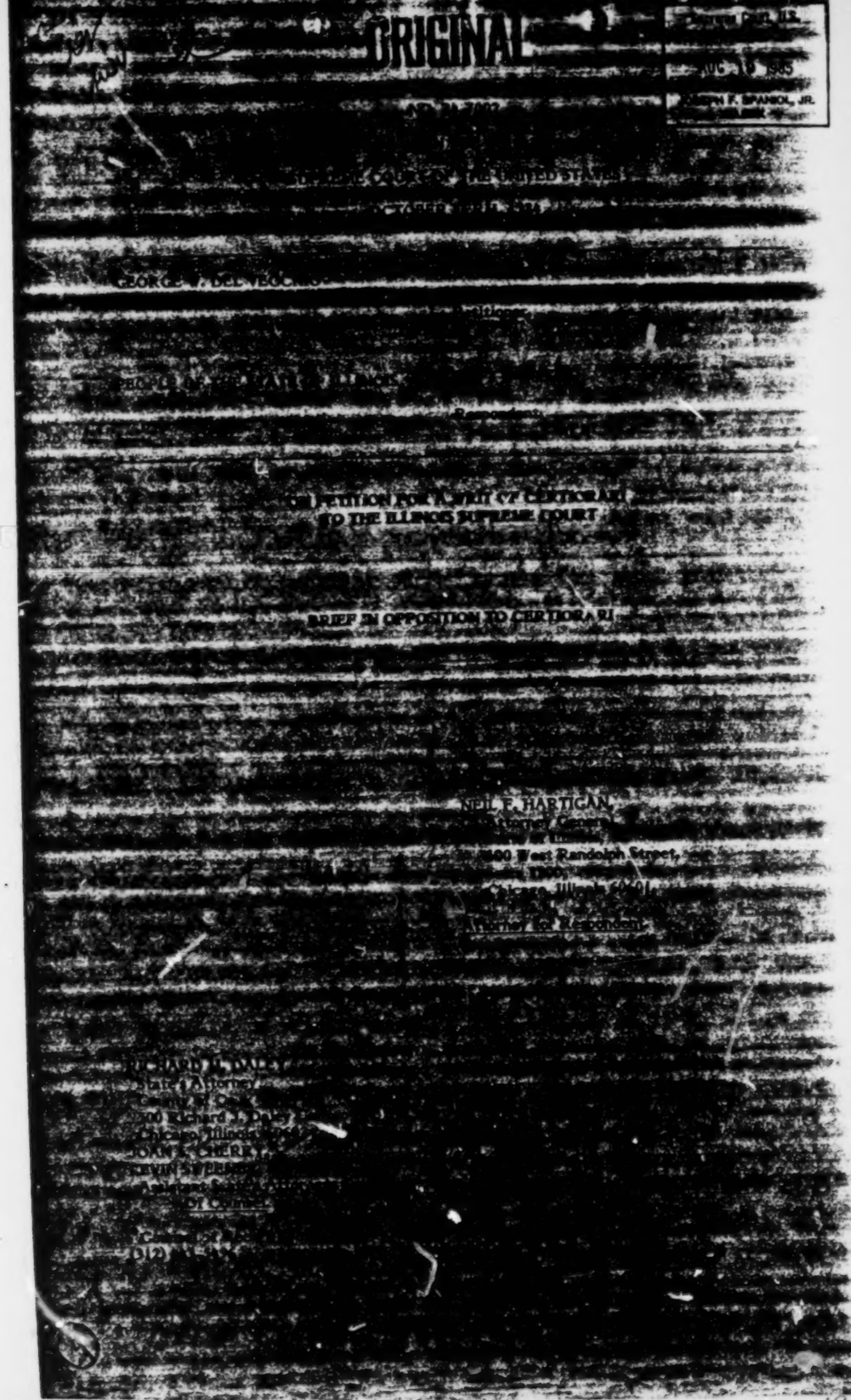

NO. 84-7002

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

GEORGE W. DEL VECCHIO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF IN OPPOSITION TO CERTIORARI

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Of Counsel.

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(312) 443-5496

QUESTIONS PRESENTED FOR REVIEW

(1)

Whether the prosecutor's argument deprived petitioner of any constitutional right when that argument was true.

(2)

Whether a defendant may attack the admissibility of the evidence supporting a 14 year old murder conviction when that conviction is used against him at sentencing for a subsequent offense.

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TABLE OF AUTHORITIES

Cases:

Statutes:

NO. 84-7002

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF IN OPPOSITION TO CERTIORARI

Respondent, the People of the State of Illinois, respectfully pray that this Honorable Court deny the petition for a writ of certiorari filed in this matter.

JURISDICTION

This Court lacks jurisdiction as to the second issue raised in the Petition for a Writ of Certiorari, as the decision of the Illinois Supreme Court on that points rests on independent and adequate state grounds. (See Reasons for Denying the Writ, Section II)

STATEMENT OF THE CASE

Petitioner George Del Vecchio was sentenced to death as a rapist-murderer and as a multiple murderer. A jury found that on December 21, 1977 petitioner had raped Karen Canzoneri and murdered Tony Canzoreri, her six-year-old son. At the death penalty hearing it was proven that 14 years previously defendant had been convicted on a plea of guilty of the murder of Fred Christensen in the course of an armed robbery.

The 1977 Rape and Murder

On the evening of December 21, 1977, Karen Canzoneri and her son Tony were asleep in their home in Chicago. (R. 393-401) Mrs. Canzoneri was awakened in her bedroom by petitioner, who had entered with a key that he had previously stolen. She tried to shoot petitioner, but her gun would not fire. (R. 403) Petitioner took the gun, forced Mrs. Canzoneri back on her bed, and raped her. (R. 406-408)

While the rape was in progress, petitioner was distracted by the ringing of a telephone. Mrs. Canzoneri was able to flee from her house, run to her mother's home and call the police. (R. 409-413)

Several police officers arrived at the scene and captured petitioner on the roof of Mrs. Canzoneri's house. Upon searching the house the officers discovered that most of the telephone wires had been cut, apparently in an effort to avoid distractions. The officers also discovered the dead body of Tony Canzoneri, whose throat had been cut through to the vertebrae. (R. 567-68, 589-95, 625-26, 641-42, 707)

The 1965 Armed Robbery and Murder

In January, 1965 petitioner and two other young men committed two auto thefts, two armed robberies and an attempt armed robbery. One of the armed robberies was of a 66 year old man called George Christensen. Petitioner and his companions approached Mr. Christensen and petitioner demanded money. Mr. Christensen failed to immediately comply, so petitioner shot Christensen with a rifle about ten times, killing him. Then petitioner took Mr. Christensen's wallet, which contained $11.00. When petitioner was arrested he made a full confession to those crimes, and subsequently pled guilty to armed robbery and murder. Petitioner served a total of eight years in custody on those convictions. (R. 2072-2172, 2534-2541)

Trial and Sentencing

At trial for the current offense petitioner asserted the defense of voluntary intoxication, claiming that he had ingested the drug PCP and that its effects had deprived him of the ability to form an intent to commit the crimes. Ill. Rev. Stat. 1977, Ch. 38, sec. 6-3. The jury found petitioner guilty of murder, rape, deviate sexual assault and burglary.

At the death penalty hearing the jury found petitioner eligible for a death sentence for committing a murder in the course of a rape and for having been convicted of the murder of two persons. Ill. Rev. Stat. 1977, Ch. 38, secs. 9-1(b)(3), 9-1(b)(6). Petitioner called a psychiatrist in an effort to establish the mitigating factor of extreme emotional disturbance. Ill. Rev. Stat. 1977, Ch. 38, sec. 9-1(c)(2). The State called two psychiatrists who testified that petitioner did not suffer from a mental disease and was a malingerer. The jury ruled that petitioner should be sentenced to death.

REASONS FOR DENYING THE WRIT

I.

THE PROSECUTOR'S CLOSING ARGUMENT DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT BECAUSE IT WAS ACCURATE.

Petitioner argues that the closing argument of the prosecution misled the jury concerning the possible sentences of imprisonment petitioner could receive if not sentenced to death. For two reasons this argument provides no reason for a grant of certiorari. First, the prosecutor's argument was true in that it accurately stated the Illinois law at that time. Second, even assuming that there was something inaccurate in the argument, there was no violation of petitioner's rights under the United State's Constitution.

The prosecutor made two relevant points in his argument. First, he said that petitioner had been released following his previous murder conviction after serving a term of only eight years. (R. 2948-49) That was undeniably true. Second, the prosecutor said that defendant could be released after serving a few years on his current murder conviction if he managed to fool the experts. (R. 2958-59) That was also true under the Illinois law in effect in 1979. Under the law petitioner, if sentenced to imprisonment, could have served a natural life term, but also could have been released after serving less than ten years in custody.

Petitioner makes an incorrect and misleading statement when he claims that the prosecutor argued that petitioner could be paroled if not sentenced to death. At no point did the prosecutor state that petitioner could be paroled if sentenced to imprisonment. In 1978 Illinois had abolished parole. Ill. P.A. 80-1099 (eff. Feb. 1, 1978). The jury was well aware of that fact, since petitioner had elected in front of the jury to be sentenced under that new law if no death sentence was imposed. (R. 2931-32, 2998) Thus the prosecutor did not say petitioner could be paroled and the jury was aware that there was no parole under the law which would apply to a sentence of imprisonment.

But the prosecutor told the jury the truth when he said that the experts would have the power to provide the petitioner's release in a few years if petitioner was not sentenced to death. Under the Illinois law in effect in 1979 the amount of time a prisoner would spend in custody would depend on decisions by the following experts:

1. A probation officer.
2. The trial judge.
3. Officials of the Illinois Department of Corrections.
4. The Illinois Prisoner Review Board.
5. The governor of Illinois.

As noted, if the decisions of these experts had all favored petitioner, he could have served less than ten years for the murder of Tony Canzonieri and the rape of Tony's mother.

In Illinois the sentencing process, except when a death sentence was imposed, began with the presentence investigation by a probation officer. Ill. Rev. Stat. 1979, Ch. 38, sec. 1005-3-1. In that report the probation officer had to advise the trial judge of the defendant's background and of the resources available for the defendant's rehabilitation. Ill. Rev. Stat. 1979, Ch. 38, sec. 1005-3-2.

The trial judge, after examining the presentence investigation, had great discretion in imposing a sentence for murder. The sentence for murder ordinarily could not be less than 20 years nor more than 40 years, but if the trial judge found that the crime was "exceptionally brutal or heinous" the judge could impose a natural life sentence. Ill. Rev. Stat. 1979, Ch. 38, sec. 1005-8-1(a)(1).

However a sentence of imprisonment, other than a natural life sentence, was ordinarily less than half of its nominal length. A prisoner earned one day of good conduct credit for every day in custody. Ill. Rev. Stat. 1979, Ch. 38, sec. 1003-6-3(2). The Department of Corrections had discretion to set the rules for earning good conduct credit and the Prisoner Review Board had discretion to revoke such credit. Ill. Rev. Stat. 1979, Ch. 38, secs. 1003-3-2(a)(4), 1003-6-3(c).

In addition, the Department of Corrections had discretion to grant an unlimited number of 90 day sentence reductions for meritorious service. Ill. Rev. Stat. 1979, Ch. 38, sec. 1003-6-3(a)(3). Thus the Department effectively had the power to reduce a sentence to almost nothing. In 1983 the Illinois Supreme Court prospectively abolished any right to grant unlimited sentence reductions for meritorious service, but the Department of Corrections still had this power in 1979. Lane v. Sklodowski, 97 Ill. 2d 311, 454 N.E.2d 322 (1983).

Also, the Department of Corrections had discretion to periodically release a prisoner in order to work or attend school. Ill. Rev. Stat. 1979, Ch. 38, sec. 1003-13-2.

Finally, the Prisoner Review Board had the duty to conduct hearings on all petitions for executive clemency and to make recommendations to the governor. Ill. Rev. Stat. 1979, Ch. 38, sec. 1003-3-2(a)(6). The governor, of course, had discretion to commute any sentence, but he had to at least listen to the recommendations of the experts. Ill. Const., Art. V, sec. 12.

Thus everything the prosecutor said to the jury was correct, both from a legal and from a practical point of view. If the jury did not impose a death sentence, it had no power to assure that petitioner would spend more than a few years in custody. If petitioner had been sentenced to imprisonment, the experts in fact had the ability to assure either that a lenient sentence would be imposed on petitioner or that he would serve less than half of whatever sentence was imposed.

Moreover, under the United States Constitution it was proper for the jury to consider that fact. In the Ramos case the trial judge instructed the jury that a sentence of imprisonment for life, which would be imposed if there were no death sentence, could be commuted by the governor. California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). This Court held that it was proper for the jury in Ramos to consider the possibility that the defendant might be released in the future. Here the chances that petitioner might be released in the future if not sentenced to death were far greater than they were in Ramos. As this Court noted, "Surely, the respondent cannot argue that the Constitution prohibits the State from accurately characterizing its sentencing choices." 103 S.Ct. at 3454-55, n.19.

In the alternative, even assuming that there was something misleading about the prosecutor's argument here, that would not present a constitutional issue. In the first place, the prosecutor's argument was invited by an inaccurate statement on this point by defense counsel. Secondly, nothing in the prosecutor's argument tended to distract the jury from its responsibility to reach a just decision on whether petitioner should be sentenced to death.

During the death penalty hearing the defense tried hard to convince the jury that petitioner, if not sentenced to death, would spend the rest of his life in prison. Petitioner's mother and half-sister testified that he should be allowed to live, but should spend the remainder of his life in custody. (R. 2225-26, 2381) Defense counsel inaccurately said in his opening statement to the jury, "you have the power to put him in prison and keep him in prison." (R. 2069) Since the jury did not in fact have that power under Illinois law, the prosecutor was justified in telling the jury that petitioner could be released in the future if no death sentence were imposed.

This Court has held an improper argument by a prosecutor in a criminal case may not invalidate a verdict when that argument was invited by comments made by a defense attorney. United States v. Young, ___ U.S. ___, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); Lawn v. United States, 355 U.S. 339, 359, n. 15, 78 S.Ct. 311, 322-323, n. 15, 2 L.Ed.2d 321, 335-336, n. 15 (1958). Here defense counsel falsely told the jury that it had the power to keep petitioner in prison. The prosecutor had a right and a duty to correct that remark by pointing out that the decision of how long petitioner could stay in prison would be made by experts who had blundered before.

Finally, even assuming that the prosecutor's remarks were somehow misleading, they did not amount to a violation of due process. This Court does not and cannot operate as a super court of appeals correcting every minor trial error on the state level. Donnelly v. De Christoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The prosecutor's agument here met the requirements of due process because it dealt with matters which were properly before the jury.

It is true that a prosecutor may not make arguments at a death penalty hearing which distract the jury from its responsibility to reach a just verdict based on the defendant's character and record. Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Here the argument of the prosecutor was devoted to a discussion of petitioner's character and record. The possible sentences of imprisonment which petitioner might serve were a proper matter for the jury's consideration. California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). The important point about the Illinois law governing sentences for murder was that the judge and the correctional authorities would not be required to imprison petitioner for the rest of his life. The details of that law were of limited importance. Therefore nothing about the prosecutor's argument either distracted the jury from its responsibilities or led to an unreliable sentencing decision.

However, no error occurred here, constitutional or otherwise. The prosecutor did not say that petitioner could be paroled if sentenced to imprisonment. The jury knew that petitioner had elected to be sentenced under a new law which had no provision for parole as such. The prosecutor did say that, depending on the decisions of experts, petitioner could be released in the future if not sentenced to death. That statement was true under the Illinois law in effect in 1979. Since no error occurred, the petition for a writ of certiorari should be denied.

II.

IT IS A REASONABLE RULE OF PROCEDURE TO REQUIRE A DEFENDANT TO MOVE TO SUPPRESS EVIDENCE BEFORE TRIAL AND NOT WAIT UNTIL MORE THAN A DECADE LATER.

In 1965 petitioner confessed to the murder of George Christensen. He did not move to suppress the confession, and in fact pled guilty to the offense. Fourteen years later petitioner did move to suppress that confession, but the Illinois Supreme Court understandably ruled that the motion came too late. Since this was a reasonable procedural ruling under state law, supported by a valid state interest, there is no reason for this Court to review it.

There are two additional reasons why petitioner's argument on this point is baseless. First, he was not prejudiced at the death penalty hearing by the use of his confession to the 1965 murder. That confession was cumulative evidence. In addition, the 1965 murder was not necessary to establish eligibility for a death sentence since petitioner was also eligible for the death penalty for committing a murder in the course of a rape. Second, there are important policy reasons why there should be no exclusionary rule concerning evidence of other crimes offered at a sentencing hearing.

However the basic reason why this Court should deny certiorari is the decision of the Illinois Supreme Court rests on independent and adequate state grounds. Petitioner had a right to move to suppress his confession at some point, but the question of when that motion should have been made is purely a matter of state law. It is reasonable to require that a motion to suppress evidence be made before trial on the charge to which that evidence applies. It is also reasonable to enforce the rule that a failure to make a motion to suppress and a plea of guilty to an offense waives any objection to the use of evidence of that offense at a later sentencing hearing on a different charge.

Illinois law requires that a motion to suppress a confession be made in writing prior to trial. Ill. Rev. Stat. 1983, Ch. 38, sec. 114-10. The same requirement was in effect in 1965. Ill. Rev. Stat. 1965, Ch. 38, sec. 114-10. It is also well established Illinois law that a plea of guilty is a waiver of all defenses to a charge. People v. Phelps, 51 Ill. 2d 35, 280 N.E.2d 203 (1972); People v. Brown, 41 Ill. 2d 503, 244 N.E.2d 159 (1969); People v. Smith, 23 Ill. 2d 512, 179 N.E.2d 20 (1961).

Thus under Illinois law a motion to suppress a confession must be made before trial on the charge to which the defendant confessed, and is un-

timley when it is made after the confession is offered to prove guilt of that charge at a sentencing hearing for another offense. There are a number of valid state interests supporting that rule. The most important of these state interests, of course, is a concern that the voluntariness of confessions be litigated in a timely fashion.

It is of great importance that a motion to suppress a confession be heard while the witnesses are still available and their memories are still fresh. Here, for example, petitioner waited 14 years before moving to suppress the confessions to murder that he made to the police and to a prosecuting attorney. It would be unrealistic to believe that a fair hearing could be held after so long a time.

After a period of 14 years it would be likely that material witnesses to the taking of a confession would be dead, retired or lost. Those witnesses who remained might well have no clear memory of the details of the case. The passage of time thus would be likely to deprive the State of any real opportunity to respond to a motion to suppress a confession.

There are elements of equitable estoppel and laches involved here. A defendant who pleads guilty admits to an offense and waives all defenses to the charge. Thus it is reasonable to foreclose him from attempting to suppress evidence when that conviction is used at a sentencing hearing on a different crime. Also, a defendant who initially refuses to move to suppress a confession should not be permitted to attack the admissibility of that confession after the passage of time has deprived the State of an adequate ability to respond.

This Illinois procedural rule does not place any significant limitation on a defendant's right to a hearing on the admissibility of his confession. A defendant who has a good motion to suppress will make that motion, whether he is considering a plea of guilty or not. A defense attorney will not agree to a plea bargain until he knows whether the State would be allowed to use the defendant's confession as evidence at trial. Therefore all that Illinois law requires is that a motion to suppress a confession be made at the proper time.

Thus the decision of the Illinois Supreme Court on this issue rests on independent and adequate state procedural grounds. For very good reasons the Illinois procedural rule requires that a motion to suppress a confession must be made before trial on the charge to which the defendant confessed. "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."

Michigan v. Tyler, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7, 56 L.Ed.2d 486, 500, n. 7 (1978); See also Wainwright v. Sykes, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594, 608 (1977). As this Court said in Henry v. Mississippi, 379 U.S. 443, 446, 85 S.Ct. 564, 567, 13 L.Ed.2d 408, 412 (1965):

> It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even when those judgements also decide federal questions. The principle applies not only in cases involving state substantive grounds, but also in cases involving procedural state grounds. (Citation omitted)

In many ways this matter is similar to the Tollett case, in which this Court held that a plea of guilty in state court waives the right to raise defenses to the charge in subsequent federal habeas corpus proceedings. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In Tollett this Court said: "...a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S. at 267.

Petitioner relies on the Haring decision, but in that case this Court did not rule on any question of constitutional law or impose any procedural requirements on state court systems. Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983). All that was decided in Haring was that a plea of guilty in state court did not foreclose an action for damages under 28 U.S.C. sec. 1983 based on alleged misconduct by the police in the investigation of the offense. Similarly, the decisions from lower federal courts cited by petitioner have nothing to do with the constitutionality of any state procedural rule. Watts v. Graves, 720 F.2d 1416 (5th Cir. 1983); United States v. Magnuson, 680 F.2d 56 (8th Cir. 1982); United States v. Johnson, 634 F.2d 385 (8th Cir. 1980).

There are several additional reasons why this Court should refuse to review this matter. In the first place, petitioner was not prejudiced by the admission of his 1965 confession into evidence at the death penalty hearing, because that confession was cumulative. The State, of course, proved that

petitioner had been convicted of the 1965 murder on a plea of guilty, and petitioner does not question the admissibility of that evidence. In addition, the State offered confessions of two of petitioner's co-defendants from the 1965 case. In Illinois, as in most states, hearsay evidence is admissible at the aggravation and mitigation phase of a death penalty hearing. Ill. Rev. Stat. 1979, Ch. 38, sec. 9-1(e). Therefore the hearsay statement of a co-defendant from a prior offense is admissible, whether the defendant gave an interlocking statement or not. People v. Lyles, 106 Ill. 2d 373, 478 N.E.2d 291 (1985); People v. Davis, 95 Ill. 2d 1, 451 N.E.2d 2d 525 (1983). The State offered evidence of petitioner's conviction for the 1965 murder and also offered statements of the co-defendants on how that crime occurred, and defendant's confession added little or nothing to that.

Secondly, the exclusionary rule should not apply at a sentencing hearing when evidence is offered concerning prior offenses to which the defendant had pled guilty. As noted, a motion to suppress evidence concerning old crimes would be untimely and would rely on stale evidence. Also, it is fair to hold a defendant to his previous waiver of the right to move to suppress evidence of a particular crime. Furthermore, applying the exclusionary rule at the aggravation and mitigation phase of a death penalty hearing would deprive the jury of complete and accurate account of the defendant's character and record. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Even more important is the fact that the policy reasons behind the exclusionary rule do not apply when evidence of prior offenses is offered at a sentencing hearing. The major purpose of the exclusionary rule is to deter police misconduct. United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). But no police officer is going to unlawfully obtain evidence in order to use it at a hypothetical future sentencing hearing which might or might not take place many years in the future after a suspect has committed a different crime.

However it is unnecessary for this Court to consider these questions. The decision of the Illinois Supreme Court on this issue was not based on federal constitutional grounds, but on a reasonable state procedural rule. Since there were independent and adequate state grounds supporting that decision, this Court should deny review.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully pray that this Honorable Court deny the petition for a writ of certiorari filed in this matter.

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REPLY BRIEF

ORIGINAL

No. 84-7002

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GEORGE W. DEL VECCHIO, Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE ILLINOIS SUPREME COURT

PETITIONER'S REPLY MEMORANDUM

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I.

TAKEN IN CONTEXT, THE PROSECUTOR'S ARGUMENT CAN ONLY BE INTERPRETED AS RAISING THE PROBABILITY OF DISCRETIONARY PAROLE. FURTHERMORE, THIS ARGUMENT WAS NOT INVITED WHERE THE PROSECUTOR FIRST RAISED IT PRIOR TO THE TIME DEFENSE COUNSEL SPOKE TO THE JURY.

The State argues that Caldwell v. Mississippi does not govern this case because the prosecutor's argument was accurate. In the State's view, the prosecutor's remarks did not refer to the possibility of discretionary parole, but only to the role of the probation officer in preparing a presentence report, of corrections officials in granting discretionary good time, and of the Prisoner Review Board and the governor in determining whether a clemency petition should be granted.

It should be noted that until reaching this Court, the State has never attempted to interpret the prosecutor's remarks in this manner. At the argument on the motion in limine, the trial prosecutor himself stated that such remarks were proper because Mr. Del Vecchio was eligible for the equivalent of parole. (R. 2930-2933) Certainly if the prosecutor intended his remarks to refer to corrections officials or the governor of Illinois, it would be reasonable to have expected him to say so.

The State also failed to argue its present interpretation of the prosecutor's remarks to the Illinois Supreme Court, which regarded those remarks as a discussion of the possibility of parole.[1] See 105 Ill.2d 435-437, 475 N.E.2d 850-851. If the prosecutor's remarks had the meaning now ascribed, the State would surely have advanced this argument prior to reaching this Court.

Furthermore, examination of the prosecutor's remarks reveal that they can be fairly considered only as a reference to the possibility of parole. In his opening argument, the prosecutor stated that the "so-called experts" had paroled Mr. Del Vecchio after eight years, that these "so-called experts" had cost Tony Canzoneri his life, and that the only way to prevent the "horrible mistake" of another parole was to impose the death penalty. (R. 2065-2067; See footnote on page 11 of the petition for certiorari.) In these remarks the prosecutor explicitly used the term "experts" as applying to the persons who had paroled Mr. Del Vecchio on his earlier offense.

In closing argument, the prosecutor repeatedly used the term "experts" in connection with the earlier decision to parole Mr. Del Vecchio. The prosecutor again stated that Mr. Del Vecchio had been paroled after eight years, that the jury had to protect itself and the public from further crimes by Mr. Del Vecchio, that the "experts" could not be trusted because they could be fooled, and that unless Mr. Del Vecchio was executed another "expert" would decide to release him in a few years. (R. 2948, 2958-2959, 2997; See pages 10-11 of the petition for certiorari.) Nowhere in his argument did the prosecutor refer to the governor, the Prisoner Review Board, the Department of Corrections, or the probation office. The only reasonable interpretation of these remarks is that the same "experts" who had paroled Mr. Del Vecchio before would do so again unless a death penalty was imposed. This argument was misleading and erroneous because Mr. Del Vecchio was not eligible for discretionary parole.

In any event, the question before this Court is not whether a proper purpose for the prosecutor's remarks can conceivably be found, but instead how those remarks were likely to be interpreted by the jury. See Francis v. Franklin, 471 U.S. ___, 85 L.Ed.2d 344, 354-355, 105 S.Ct. 1965 (1985). In the context in which they were made, these remarks were likely to be interpreted as indicating that unless Mr. Del Vecchio was executed, he could someday be released at the discretion of untrustworthy persons who were unaware of the facts and could be easily fooled. There certainly would be no reason for the jury to suspect that the prosecutor was referring to the possibility that a petition for executive clemency might some day be filed in Mr. Del Vecchio's behalf, or that he might receive ninety days discretionary good time.

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[1] Instead, the State argued that the remarks were accurate because they referred only to the historical fact of parole, a position it has abandoned before this Court.

The State also argues that the jury knew that parole was not possible under the law applicable to this case, because Mr. Del Vecchio had elected the new law in front of the jury. (Brief in Opposition, pp. 5, 8) The record does not support this contention. The hearing at pages 2931-2937 of the transcript concerned the defense motion in limine, and obviously occurred outside the jury's presence, as the trial court ended the hearing by stating that the bailiff could bring back the jury. (R. 2937)

The State's second reference is to page 2298 of the transcript, where the trial court informed the jury that Mr. Del Vecchio had elected to be sentenced under the new act. However, the trial court did not indicate that discretionary parole was not possible, but merely informed the jury that the possible sentences would be either a term of twenty to eighty years or natural life. There was nothing in these remarks to indicate to the jury that the prosecutor was incorrect when he argued that Mr. Del Vecchio's release would be left to the same experts who had paroled him before, especially since the trial court overruled defense counsel's objections to those arguments.

Finally, the State argues that the prosecutor's remarks were invited by defense counsel's argument at the sentencing hearing. However, the State does not explain why the prosecutor responded to defense counsel's remarks before defense counsel ever had the opportunity to speak to the jury. In his opening argument, the prosecutor argued that the so-called experts had paroled Mr. Del Vecchio once, that those experts had cost Tony Canzoneri his life, and that the only way to avoid having these experts release Mr. Del Vecchio again was to impose a death sentence. Certainly at this point there was no defense strategy or tactic which "invited" such an argument. Furthermore, as in Caldwell v. Mississippi, the prosecutor's argument that Mr. Del Vecchio's release would be left to the same individuals who had paroled him before had nothing to do with the question whether, under the law, it might someday be possible for Mr. Del Vecchio to be released. See 86 L.Ed.2d at 244-245, 248.

II.

PROCEDURAL DEFAULT IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND WHERE THE STATE COURT DID NOT FIND A PROCEDURAL BAR, BUT INSTEAD REACHED THE MERITS OF THE ISSUE.

The State argues that this Court lacks jurisdiction to consider the trial court's failure to provide a hearing on the motion to suppress the confession because the Illinois Supreme Court's decision rests on independent and adequate State grounds. In the State's view, this Court should deny certiorari because Illinois statutory law requires that a motion to suppress be made prior to trial. Under the State's reasoning, because Mr. Del Vecchio did not move to suppress his statement before pleading guilty to the underlying charges in 1965, Illinois statutory law prohibits him from challenging his statement when used as aggravating evidence in a separate death penalty proceedirg fourteen years later. However, the statutory requirement cited by the State does not constitute an adequate and independent State ground because the Illinois Supreme Court did not rely on that ground in its opinion, and because Illinois does not uniformly apply the requirement that a motion to suppress be made before trial.

This Court has held repeatedly that its jurisdiction is precluded by an independent State ground only where the State court in fact relied upon that ground as a reason for its decision. Most recently, in Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985), this Court held that the mere existence of a basis for a State procedural bar does not affect jurisdiction unless the State court actually used the procedural bar in reaching its decision. 86 L.Ed.2d at 238. Likewise, in Delaware v. Prouse, 440 U.S. 648, (1979), this Court ruled that even where State law would have provided a basis for the decision, an adequate and independent ground exists only where the State court clearly intended to rest its decision on State law. 440 U.S. at 652.

In Orr v. Orr, 440 U.S. 268 (1979), the respondents argued that any challenge to the constitutionality of an Alabama alimony statute had been waived because that issue had not been raised at

the time of the original divorce decree. In response, this Court noted:

> This unexcused tardiness may well have constituted a procedural default under State law, and if Alabama had refused to hear Mr. Orr's constitutional objection on that ground, we might well have been without jurisdiction to consider it here....
>
> But in this case neither Mrs. Orr nor the Alabama courts at any time objected to the timeliness of the presentation of the constitutional issue. Instead, the Alabama [courts] both considered the issue to be properly presented and decided it on the merits. [citations omitted] In such circumstances, the objection that Mr. Orr's complaint "'comes too late' -- is clearly untenable."
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> 440 U.S. at 274.

In Orr, this Court also held that the manner and time in which a federal question is raised is irrelevant where the issue was actually decided on its merits. 440 U.S. at 274-275. See also County Court of Ulster County v. Allen, 442 U.S. 140 (1979) (State court did not base its decision on a State procedural ground where the prosecution never argued procedural default to the State court, which reached the issue on its merits); Beecher v. Alabama, 389 U.S. 35 (1967) (where State supreme court found no procedural bar and considered the issue on the merits, this Court would not treat the decision as resting on an independent State ground even though there is a State ground on which the lower court could have relied.)[2]

In this case, the State did not argue to the Illinois Supreme Court that the petitioner's motion was barred on statutory grounds, and the Illinois court's decision did not rest on that ground.[3] Although the State describes the Illinois Supreme

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2 The cases cited by the State are in accord with the aforementioned authorities. In both Michigan v. Tyler, 436 U.S. 499 (1978) and Wainwright v. Sykes, 433 U.S. 72 (1977), the State courts found that consideration of the issues involved was barred for State procedural reasons.

3 For purposes of clarity, it is important to note that the only independent State ground argued by the State is the statutory provision that a motion to suppress be made prior to trial. For obvious reasons, the State does not attempt to argue that the actual holding of the Illinois Supreme Court - that a voluntary plea of guilty waives constitutional rights which are not jurisdictional - is an independent State ground. Whether a guilty plea waives the Fifth Amendment right to challenge involuntary statements is clearly a matter of federal law.

Court's decision as "that the [suppression] motion came too late" (Brief in Opposition, p. 9), no such holding was made. The entire finding of the Illinois Supreme Court concerning this issue consists of the following paragraph:

> Defendant contends next that the circuit court erred in admitting evidence at the sentencing hearing of his allegedly involuntary confession and subsequent guilty plea to the 1965 murder of Fred Christiansen without first conducting a hearing on his motion to suppress the confession on voluntariness grounds. While defendant contests the voluntariness of his inculpatory statement, he does not contend that the guilty plea was involuntarily entered. This Court has held that "a constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional. [citation omitted] Thus, the issue was waived by the voluntary plea of guilty.
>
> 105 Ill.2d at 432-433, 475 N.E.2d at 849.

The above holding does not refer to any lack of timeliness in filing the motion to suppress. Instead, it is a holding on the merits of the question - that a voluntary plea of guilty waives any right to challenge the voluntariness of a confession when used in a different proceeding. Because the prosecution's asserted independent ground was not the basis of the Illinois Supreme Court's opinion, this Court's jurisdiction is not precluded.

In addition, even if the Illinois court had based its decision on the Illinois statute, there would be no adequate and independent State ground because the requirement that a motion to suppress be filed before trial is not uniformly applied in Illinois. In Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), this Court held that a State procedural rule is an independent and adequate ground for a decision only where the State uniformly and consistently applies that rule so as to deny itself jurisdiction. Where the rule is discretionary rather than jurisdictional, review is not barred. 396 U.S. at 234.

Under Illinois law, the requirement that a motion to suppress be filed prior to trial is a rule of administrative convenience intended to avoid time-consuming collateral inquiries at trial, and is not a matter of jurisdiction. See People v.

Braden, 34 Ill.2d 515, 216 N.E.2d 808 (1966). The defendant may raise the voluntariness of his confession either before trial or when the statement is introduced. See People v. Bryant, 101 Ill.App.2d 314, 243 N.E.2d 354 (1st Dist. 1968). Furthermore, the trial court has discretion to consider a motion to suppress which is not made prior to trial. People v. Hoffman, 84 Ill.2d 480, 419 N.E.2d 1145 (1981). Therefore, because Illinois does not consistently apply the rule that a motion to suppress must be filed before trial, no adequate and independent State ground exists.

The prosecution devotes very little of its brief to the merits of this question. However, the following points should be made. First, the State argues that under Tollett v. Henderson, 411 U.S. 258 (1973), a criminal defendant who has admitted his guilt may not thereafter raise independent constitutional claims which arose prior to the guilty plea. However, in Tollett the petitioner was attacking the conviction which was based on his guilty plea. In this case, the State used the defendant's confession not to gain his conviction on the underlying charge, but as aggravating evidence in a totally separate prosecution.

Furthermore, in Haring v. Prosise, 462 U.S. 306 (1983), this Court specifically rejected the argument that under Tollett a plea of guilty waives all subsequent constitutional claims. Instead, a defendant's willingness to admit his guilt merely renders the question of constitutional violations irrelevant to that prosecution. 462 U.S. 320-322. Although the State argues that Haring concerns only a defendant's ability to bring a Section 1983 action after pleading guilty, the same rationale should apply when the question is whether by pleading guilty a defendant agrees to permit unconstitutionally seized evidence to be introduced in a death penalty proceeding. Indeed, it would be ironic if a voluntary plea of guilty permits a civil action for damages but at the same time precludes a challenge at a death hearing.

The State also argues that involuntary confessions need not be excluded from death penalty hearings because the purpose of

the exclusionary rule is to deter police misconduct. (Brief in Opposition, p. 12) Although a primary purpose of the Fourth Amendment exclusionary rule is to deter police misconduct, United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), involuntary statements are excluded because they are unreliable. Jackson v. Denno, 378 U.S. 368, 385-386 (1964).

Finally, the State argues that admission of Mr. Del Vecchio's statement was harmless error because of the admission of the confessions of two co-defendants. Of course, this Court has held that use of an involuntary statement cannot be harmless error. See Mincey v. Arizona, 437 U.S. 385, 398 (1978). In addition, neither of the co-defendants testified at the sentencing hearing, and admission of their statements violated petitioner's right of confrontation under Bruton v. U.S., 391 U.S. 123 (1968). The Illinois Supreme Court specifically held that admission of the co-defendants' statements was not error because those statements "interlocked" with Mr. Del Vecchio's confession. 105 Ill.2d at 440, 475 N.E.2d at 852. Had Mr. Del Vecchio's statement been excluded as involuntary, the co-defendants' statements could not have been admitted, and the evidence in the case would have been much different. For instance, there would have been no evidence that Mr. Del Vecchio had been the triggerman in the 1965 offense, that he had been involved in other crimes, or that the crimes involved brutality. Furthermore, the prosecutor could not have argued that the circumstances surrounding the 1965 crimes indicated that the death penalty was the only proper sentence. Therefore, the State's argument that admission of the co-defendants' confessions made any use of Mr. Del Vecchio's statement harmless cannot be sustained.

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OPINION

SUPREME COURT OF THE UNITED STATES

GEORGE W. DEL VECCHIO *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 84-7002. Decided October 7, 1985

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Despite this Court's demand "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976), the Illinois Supreme Court found there to be no error in the admission of two confessions at petitioner's capital sentencing hearing, without any inquiry having been made as to their reliability. Because those confessions had been obtained in connection with charges to which petitioner had long before pleaded guilty, the court found petitioner precluded from challenging their voluntariness later, when he was fighting for his life. Even were I to believe that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari in this case to determine whether the Illinois Supreme Court's decision can be reconciled with "the standard of reliability that the Eighth Amendment requires," *Caldwell* v. *Mississippi*, —— U. S. ——, —— (1985). See *Barefoot* v. *Estelle*, 463 U. S. 880, 924–925 (1983) (BLACKMUN, J., dissenting).*

*Petitioner also raises a substantial claim that the prosecutor's summation at trial falsely represented to the jury that petitioner would eventually be eligible for discretionary parole if he were to receive a life sentence. Such inaccurate representations may well have "so affect[ed] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment," *Caldwell* v. *Mississippi*, *supra*, at ——, and had this Court granted certiorari, this claim would have merited its attention.

I

Petitioner George Del Vecchio was convicted in 1979 of murder, rape, deviate sexual assault and burglary, and the state sought the death penalty. At his capital sentencing hearing, the prosecutor urged as a statutory aggravating factor the fact that in 1965, when he was 16 years old, petitioner had been convicted upon a plea of guilty to charges of murder, robbery and attempted robbery. The prosecution also sought to introduce two confessions that petitioner had made to those previous crimes; these confessions, made to a police officer and an assistant district attorney respectively, contained detailed statements as to petitioner's role in the 1965 crimes. Petitioner moved to suppress these statements at the sentencing hearing on the grounds that they had been induced through physical and psychological coercion and that their use was therefore barred by the Fifth and Fourteenth Amendments. The trial court denied this motion, refusing even to conduct a hearing on it. In his closing argument, the prosecutor pointed to the 1965 confessions as evidence that petitioner was a career criminal who did not deserve to live. The jury proceeded to find two aggravating circumstances and no mitigating circumstances sufficient to preclude a sentence of death. Petitioner was sentenced to die.

In his appeal to the Illinois Supreme Court, petitioner argued that the use of his 1965 confessions without a hearing as to their voluntariness was prejudicial error. The court rejected this claim, concluding:

> While defendant contests the voluntariness of his inculpatory statement, he does not contend that the guilty plea was involuntarily entered. This court has held that a "constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional." (*People* v. *Brown* (1969), 41 Ill. 2d 503, 505, 244 N. E. 2d 159.) Thus, the issue was waived by the voluntary plea of guilty.

475 N. E. 2d 840, 849 (Ill. 1985).

II

The Illinois Supreme Court's harsh waiver rule stands in opposition to and must ultimately give way to the constitutional requirement that a defendant facing a death sentence be given an opportunity to challenge the reliability of all evidence urged by the prosecution in support of that sentence. Although this Court has on occasion been divided as to whether this requirement is rooted in the Due Process Clause or the Eighth Amendment, compare *Gardner* v. *Florida*, 430 U. S. 349, 358–360 (1977) (plurality opinion) with *id.*, at 362–364 (WHITE, J., concurring in the judgment), a concern for reliability has been one of the central "themes . . . reiterated in our opinions discussing the procedures required by the Constitution in capital sentencing determinations," *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983). See *Barefoot* v. *Estelle*, *supra*, at 924–925 (BLACKMUN, J., dissenting). This concern is squarely implicated by the introduction of confessions whose voluntariness has never been determined.

The constitutional bar to the use of involuntary confessions in criminal proceedings is based in part upon the "strongly felt attitude of our society that important human values are sacrificed where an agency of government . . . wrings a confession out of the accused against his will," *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207 (1960), and upon "the deep-rooted feeling that the police must obey the law while enforcing the law," *Spano* v. *New York*, 360 U. S. 315, 320 (1959). Equally significant, however, is our awareness of "the probable unreliability of confessions that are obtained in a manner deemed coercive." *Jackson* v. *Denno*, 378 U. S. 368, 386 (1964). And if the "inherent untrustworthiness" of

involuntary confessions, *Spano* v. *New York*, *supra*, at 320, requires their exclusion from the jury during trial, see *Jackson* v. *Denno*, *supra*, at 383–391, it surely forbids their introduction in a capital sentencing proceeding, where the nature of the punishment faced makes the need for reliable information "of still greater constitutional concern." *Barefoot* v. *Estelle*, *supra*, at 925 (BLACKMUN, J., dissenting).

That petitioner pleaded guilty to the 1965 crimes and made no effort to contest the voluntariness of his confessions to those crimes has no bearing on the issue of whether the confessions were coerced. "A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against him," *Tollett* v. *Henderson*, 411 U. S. 258, 268 (1973), are all considerations that may have led petitioner to plead guilty even while he had a compelling claim under the Fifth and Fourteenth Amendments. See *Haring* v. *Prosise*, 462 U. S. 306, 318–319 (1983). Nor does the fact that petitioner pleaded guilty establish the truth of the confessions as a whole. Even if the plea constituted an admission of the basic facts comprising the elements of the offenses charged, that admission did not necessarily extend to the truth of other aspects of the confessions. And it is the reliability of those other aspects that is at issue here because it was for them that the prosecutor is likely to have sought admission of the confessions in the first place. Had he wished only to establish petitioner's of guilt of the 1965 crimes, he could have merely introduced the 1965 convictions without more.

Respondent argues that regardless of the voluntariness of petitioner's confessions, this Court should not review his claim because the Illinois Supreme Court's decision was based upon a reasonable state procedural rule. However, whether the forfeiture rule applied to preclude petitioner's claim constitutes an adequate state ground is a federal question, and if the rule does not serve a legitimate state interest it "ought not be permitted to bar vindication of important

federal rights," *Henry* v. *Mississippi*, 379 U. S. 443, 448 (1965). Once a defendant has pleaded guilty, the state has a legitimate interest in barring him from attacking his conviction collaterally by asserting constitutional claims that would have been adjudicated had he stood trial. Since the plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett* v. *Henderson*, *supra*, at 267, this Court has held that such a conviction is based only on the plea itself, and not whatever might have gone before. See *Haring* v. *Prosise*, *supra*, at 321.

No such state interest supports the extension of the waiver rule to bar an attack, in a subsequent capital sentencing proceeding, on the voluntariness of a confession made by a defendant concerning a crime to which he had previously pleaded guilty. Indeed, were it not for this case, one might have reasonably assumed that a rule so clearly developed to cut off collateral attacks upon a conviction supported by a plea would be applied only in that context. The Illinois Supreme Court's failure to give any justification for such a radical extension of the rule raises serious questions as to the legitimacy of the state interests implicated. Moreover, any interest the state may have in resolving the voluntariness of a confession soon after the alleged coercion has occurred must in this case be subordinated to the special demand for reliability imposed by the Eighth Amendment. The refusal of the trial court here to inquire into the voluntariness of petitioner's 1965 confessions outside the presence of the jury pursuant to *Jackson* v. *Denno*, *supra*, was thus error of constitutional magnitude.

Respondent contends that petitioner was not prejudiced by the introduction of the 1965 confessions because this evidence was merely cumulative, the prosecution having already offered evidence of petitioner's conviction and the confessions of two of petitioner's co-defendants from that proceeding. But a confession is not merely another aggregate of factual assertions. Even before this Court decided that an involun-

tary confession could not be admitted at trial, it noted that "such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." *Stein* v. *New York*, 346 U. S. 156, 192 (1953). What made the introduction of the confessions at petitioner's sentencing hearing so prejudicial is precisely the reason why the prosecution sought their admission: More damning than the information contained in them was the fact that petitioner was heard to tell of his crimes in his own words. Certainly, it cannot be said that the admission of the confessions had "no effect" on the sentencing decision as required by *Caldwell* v. *Mississippi*, *supra*, at ——.

Because the trial court here made no effort to determine whether statements so apparently conclusive of petitioner's character had been obtained in a manner that would cast doubt on their trustworthiness, it failed to guarantee "the reliability in the determination that death is the appropriate punishment" that this Court has demanded in capital procedures, *Woodson* v. *North Carolina*, *supra*, at 305. I would therefore grant certiorari and vacate petitioner's death sentence.